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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 581

In the Matter

of

The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the steamship MANDU.

GREAT AMERICAN INSURANCE COMPANY,
Petitioner.

PETITION OF GREAT AMERICAN INSURANCE COMPANY FOR WRIT OF CERTIORARI.

FORREST E. SINGLE,
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Great American Insurance Company.

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Counsel.

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GREAT AMERICAN INSURANCE COMPANY, Petitioner.

PETITION OF GREAT AMERICAN INSURANCE COMPANY FOR WRIT OF CERTIORARI.

Petitioner, Great American Insurance Company, prays for a writ of certiorari to be issued to review a decision of the Circuit Court of Appeals for the Second Circuit modifying the decree of the District Court for the Eastern District of New York.

JURISDICTION.

Jurisdiction is based on Section 240-a of the Judicial Code as amended (28 U. S. C., Sec. 347 [a]).

OPINIONS BELOW.

The latest opinion of the Circuit Court of Appeals (R. 2204) is reported at 114 F. (2d) 361. A petition for

rehearing was denied without opinion on August 19, 1940 (R. 2209). The previous opinion of the Circuit Court of Appeals (R. 738a) is reported as *The Mandu*, 102 F. (2d) 459.

The first opinion by the District Court (E. D. N. Y.), overruling petitioner's exceptions to the amended petition for limitation of liability (R. 210-218), is reported 15 F. Supp. 627. The subsequent opinions of the District Court dismissing the claims in the limitation proceeding and allowing the owner of the MANDU to withdraw its petition for limitation of liability (R. 500; 632-642) are reported 20 F. Supp. 820, and 21 F. Supp. 372. These decisions were reversed by the Circuit Court of Appeals in *The Mandu*, 102 F. (2d) 459. Following the trial on the merits, the District Court wrote an opinion (R. 2160-71), 1939 A. M. C. 1313, not officially reported. The District Court also made extensive findings of fact (R. 2173-84) holding both vessels equally at fault for the collision and awarding petitioner herein a recovery from the owner of the MANDU of 50% of the cargo loss on the DENDERAH, which was later reduced by the Circuit Court of Appeals to 20% in its opinion reported at 114 F. (2d) 361. The order for mandate was entered in the office of the Clerk of the Circuit Court of Appeals on August 21st, 1940 (R. 2211).

STATEMENT.

This cause involves a collision between the steamships MANDU and DENDERAH in the entrance to the harbor of Santos, Brazil, on July 31, 1929. As a result of the collision the DENDERAH was sunk and became a total loss, and a great portion of her cargo was either lost, sustained serious damage, or was charged with heavy general average contributions.

PROCEEDINGS BELOW.

Companhia de Navegacao Lloyd Brasileiro, as owner of the MANDU, filed a petition for limitation of its liability under Rev. Stat. §§4283-4289 in respect to loss or damage sustained by the collision (R. 52). Your petitioner (claimant below), Great American Insurance Company, filed claim in the limitation proceeding both on its own behalf, as underwriter on a portion of the cargo lost and damaged on the DENDERAH, and also as assignee of underwriters of other cargo (R. 88) similarly situated.

An amendment to the petition for limitation of liability (R. 169) set forth as a defense *inter alia* (R. 172) that the collision occurred in the territorial waters of the United States of Brazil between a Brazilian vessel and a German vessel; that both Germany and Brazil were at the time parties to a treaty entitled "The International Convention for the unification of certain rules of law in regard to collisions," also known as "The Brussels Convention of September 23, 1910"; that said treaty governed the rights and obligations of the parties; that by said treaty the said nations agreed on behalf of their nationals that where a collision occurred between their seagoing vessels, compensation due for damages caused to their vessels or to any cargo on board thereof should be made in accordance with the provisions of said treaty, and that damages resulting from the collision should be allocated pursuant to the provisions of said treaty; and that by virtue of said treaty, if both vessels were in fault, the liability of each vessel was in proportion to the degree or fault respectively committed.

Exceptions by Great American Insurance Company (R. 208) to the foregoing defense were overruled by the District Court for the Eastern District of New York (R. 210-218; 15 F. Supp. 627).

At the first trial in the District Court it was contended for the owner of the MANDU (respondent here) that Great American Insurance Company, being an assignee with respect to the great portion of the cargo interest, although interested on its own behalf as insurer on certain shipments, had no standing in Court and was not a proper party claimant to the limitation proceeding. This contention was upheld by the District Court, which dismissed the claim of Great American Insurance Company, and allowed the Companhia de Navegacao Lloyd Brasileiro to withdraw its petition for limitation of liability (R. 500; 636-42; 20 F. Supp. 820, 21 F. Supp. 372).

On appeal the Circuit Court of Appeals for the Second Circuit affirmed the order of the District Court holding that the provisions of the Brussels Convention governed the rights and liabilities of the parties and reversed the order of the District Court dismissing the claim of Great American Insurance Company permitting the owner of the MANDU to withdraw its petition, and remanded the cause to the District Court for determination on the merits (R. 738a; 102 F. [2d] 459).

Following a trial on the merits, the District Court held that both vessels were equally at fault for the collision and, applying Art. IV of the Brussels Convention, awarded claimant (petitioner here), Great American Insurance Company, a recovery of 50% of its damages from Companhia de Navegacao Lloyd Brasileiro, owner of the MANDU (R. 2160-71; 1939 A. M. C. 1313, not officially reported).

An appeal was taken to the Circuit Court of Appeals by Companhia de Navegacao Lloyd Brasileiro, urging that the MANDU was without fault and that she should be exonerated from liability. The Circuit Court of Appeals affirmed the holding of fault on the part of both vessels, but on its own motion and without briefs from the interested parties or argument on the question, modi-

fied your petitioner's recovery against the owner of the MANDU by decreasing the award to cargo interests from 50% to 20% of the damages sustained, upon the theory that the faults of the DENDERAH were four times as great as the faults of the MANDU, and that as the Brussels Convention provided for recovery by either ship or cargo only in proportion to the faults of the respective vessels, the Great American Insurance Company could recover only 20% of the cargo damage (R. 2204; 114 F. [2d] 361).

Petitioner herein seeks a review of both decisions of the Circuit Court of Appeals. It first seeks a review of that part of the Court's first decision holding that the Brussels Convention governs the rights and liabilities of the parties as to the rights of recovery. If this Court determines that the Brussels Convention does not govern the rights of cargo claimants, the MANDU having been held at fault, her owner is liable to cargo interests for its full damages and no further questions need be considered. On the other hand, if it be determined that the Brussels Convention governs the rights of innocent cargo just as it does those of the wrongdoing vessels, then your petitioner seeks a review of the Court's second decision as to apportionment of damages other than equally. No question of fact is presented, the issues involved being purely of law.

QUESTIONS PRESENTED.

1. In a petition for limitation of liability brought by a foreign shipowner (Brazilian) in a United States Court, involving a collision between vessels of two foreign countries (Brazil and Germany), does the Brussels Convention govern the admeasurement of damages to the extent of depriving innocent cargo from a full recovery from either of the offending vessels, subject to the right of limitation of liability under the United States statutes?

2. Is it not contrary to the public policy of the United States to allow a foreign subject to seek the refuge of our Courts and the benefit of our protective statutes (limitation of liability statutes), and at the same time obtain the benefit, in certain other respects, of foreign law (Brussels Convention) which is contrary to our own law?

3. Is it not contrary to the public policy of the United States that an innocent party who has suffered damage due to negligence of a joint tort feasor shall be deprived of its right in our courts to recover *in solido* against any one of the joint tort feasors?

4. Assuming the Brussels Convention governs the measure of recovery, did the Circuit Court of Appeals err in apportioning fault between the DENDERAH and the MANDU other than equally?

5. Was the Circuit Court of Appeals justified in making petitioner's recovery only 20% against the owner of the MANDU, instead of 50% as found by the District Court?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The United States has consistently refused to adopt the Brussels Convention which the Court below has held controlling.

2. The decision of the Circuit Court of Appeals is the first and only decision of any Circuit Court of Appeals in the United States holding that the Brussels Convention governs the amount of damages recoverable in a Court of the United States.

3. The decisions of this Court in *La Bourgogne*, 210 U. S. 95, and *The Titanic*, 233 U. S. 718, establish that in proceedings for limitation of liability brought by a foreign vessel owner American law must be applied, both

as to the right and the amount of claimant's recovery. The decision of the court below in applying the Brussels Convention to cut down the amount of petitioner's (cargo claimant's) recovery is contrary thereto. The decision of the court below is also contrary to *Galef* v. *United States*, 25 F. (2d) 134 (E. D. So. Car.).

4. The decision of the court below in apportioning damages other than each vessel bearing 50% of the total damages is contrary to the decision of this Court in *The Atlas*, 93 U. S. 302, and the decision of the Circuit Court of Appeals (3rd Circuit) in the *Margaret-Manchester Merchant*, 30 F. (2d) 923, 928.

5. The questions raised by this petition are of great importance to common carriers of merchandise, underwriters and commercial interests in general.

CONCLUSION.

It is respectfully submitted that this controversy presents important questions never passed upon by this Court, also a serious conflict in the decisions of the Federal Courts, and is of such general concern as to merit a review by this Honorable Court.

FORREST E. SINGLE,
Counsel for Petitioner,
Great American Insurance Company.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to favorable consideration of the Court, and that it is not filed for the purpose of delay.

FORREST E. SINGLE.

New York, November 15, 1940.

Supreme Court of the United States

OCTOBER TERM, 1940.

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The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the steamship MANDU.

GREAT AMERICAN INSURANCE COMPANY, Petitioner.

BRIEF IN SUPPORT OF PETITION OF GREAT AMERICAN INSURANCE COMPANY FOR WRIT OF CERTIORARI.

POINT I.

THE COURT BELOW ERRED IN HOLDING THAT ARTICLE IV OF THE BRUSSELS CONVENTION GOVERNED THE RIGHTS AND LIABILITIES OF THE PARTIES IN MEASURING THE EXTENT OF DAMAGES RECOVERABLE FOR LOSS AND DAMAGE TO CARGO.

The MANDU was found at fault. Hence, were it not for the holding of the court below that Article IV of the Brussels Convention governed the rights of the parties, petitioner herein (cargo claimant) would have been entitled to recover its full damages from the owner of the MANDU under well settled American law. See *The New York,* 175 U. S. 187. However, the court below held that

Article IV of the Brussels Convention was applicable, that the faults of the DENDERAH were four times as serious in degree as those of the MANDU, and modified the opinion of the District Court to provide that only one-fifth of the cargo damages could be recovered from the owner of the MANDU. In so holding it is respectfully submitted that the court below erred.

A. Under well settled rules of this court it is impossible for a court of the United States properly to apply Article IV of the Brussels Convention. The court below, accordingly, should not have applied it.

Article IV of the Brussels Convention provides (R. 182):

> "If two or more vessels are in fault, the liability of each vessel is in proportion to the degree of the faults respectively committed; * * *
>
> The damages caused either to the vessels or to their cargoes * * * are borne by the vessels at fault in the above proportions, and even to third parties a vessel is not liable for more than such proportion of such damages."

Under these provisions it is mandatory that a Court shall first determine the proportion or percentage of fault which each of the two colliding vessels must bear with respect to the collision, *i. e.*, whether a vessel is liable for 10%, 30%, 60% or 90% or any other per cent. Unless such proportion can be determined properly by our courts the rule should not be applied.

In *The Atlas*, 93 U. S. 302, this Court held that such a rule, if adopted, would be "utterly impracticable" for the reason that a Court in Admiralty cannot apportion the loss according to the quantum of neglect or culpability on the one side or the other, saying:

"Strict justice would require, said Dr. Lushington, that the burden of making good the loss should fall upon the two delinquents in proportion to the delinquency, but in practice the proportion is impossible to be ascertained. Such a rule, if adopted, would be utterly impracticable, for the reason that the court cannot apportion the loss according to the quantum of neglect or culpability on the one side and the other; hence equal apportionment is the universal rule where there is mutual fault, even though the fault on one side may be much greater than the fault on the other. *The Milan Lush. Adm.*, 401; *The Lina*, 4 Jur. N. S. 147" (p. 314).

The binding effect of the above decision was recognized in the *Margaret-Manchester Merchant*, 30 F. (2d) 923 (C. C. A. 3), where the Court initially modified the decree of the District Court holding two colliding vessels equally at fault, and held that owing to greater fault on the part of one vessel, the damages should be divided three-quarters and one-quarter. Later, on its own motion, the Court modified its previous decision reinstating the decree of the District Court holding both vessels equally at fault (30 F. [2d] 928), saying:

"At the rehearing all doubts were dispelled by the thorough search made and assistance rendered by proctors for the several parties on a showing that, a few cases in lower courts to the contrary, the rule of the Supreme Court has been not to appraise different degrees of blame when injuries have resulted from mutual though unequal faults and apportion the loss accordingly, but to regard liability as mutual and to apportion the loss equally between the offending ships on the principle that damage by a common fault is a common loss. Beginning with the schooner *Catherine*, 58 U. S. 169, the first case

which raised the question before the court, and running through a long line of cases, *11 Corpus Juris*, 1200, *et seq.*, from which the following may be selected at random, *Atlas*, 93 U. S. 302; *North Star*, 106 U. S. 17; *Max Morris*, 137 U. S. 1; *Eugene F. Moran*, 212 U. S. 466; *White Oak Co.* v. *Boston Canal Co.*, 258 U. S. 341; this court, in its own research aided by the industry of proctors has found no case in which the Supreme Court has departed, even by variation in exceptional circumstances, from its rule of equal liability for mutual faults and equal division of damages, adopted expressly as the best rule for distributing justice between mutual wrongdoers. *The Max Morris, supra.* Yielding to these authoritative pronouncements, this court, wholly aside from whatever views it may have on the subject, is constrained to follow the rule and in consequence change its decision to that of affirmance of the decree dividing the damages equally in the manner which the law prescribes. *The North Star supra.*"

Petition for writ of certiorari was denied, 279 U. S. 862.

B. Serious and cogent reasons and wide differences between the practice and procedure in Admiralty Courts abroad and those in the United States make the Convention impossible of operation here.

Although the United States sent delegates to the Brussels Convention of 1910 and these delegates recommended that the Convention be adopted by this country, the United States has refused to adopt this Convention. Attempts to persuade the Senate to adopt it have been made as recently as January 10-14, 1938, hearings having been had before a sub-committee of the Committee on

Foreign Relations of the Senate for the 75th Congress on that date. No action, however, was taken by the Senate.

The question of adoption of the Convention has been discussed many times in the United States, not only by our Courts and legislative bodies, but also by members of the bar interested in admiralty and maritime law. Apportionment under the Brussels Convention has been disapproved, and one of the principal reasons for such disapproval has been put upon the difference in practice and procedure in collision cases abroad and the procedure here. Abroad the Courts have the assistance of nautical assessors, whose advice is always at the command of the English or Continental judges. In the United States no such assessors are provided, and accordingly if fault were to be apportioned our Courts would have imposed upon them the extraordinarily difficult task of weighing and determining the degree of fault in collision cases. The report of the Standing Committee on Admiralty and Maritime Law to the American Bar Association on the question reads:

> "There are various reasons why the American rule should not be changed. Our courts operate without the assistance of nautical assessors, whose advice is always at the command of English judges. Moreover, only a few of the American judges have any practical knowledge of navigation, and in the opinion of the committee, it would be imposing upon our courts an extraordinarily difficult task to require them to weigh the degree of fault in a collision case" (*Proceedings,* Vol. 54, 1929, at pages 281-4).

An excellent example of how English courts use assessors in cases of this nature is found in *H. M. S. "Glorious"*, 44 Ll. L. L. Rep. 321. In this case of collision, the Trial Court had held one vessel ⅓ to blame and the

other vessel ⅔ to blame. It will be noted from the decision of the Trial Court, 43 Ll. L. L. Rep., p. 450, that the trial Judge, Mr. Justice Bateson, sat with "Captain Owen Jones and Capt. C. E. Hannan, Elder Brethren in Trinity House."

An appeal was taken solely on the question of whether the decision of fault made by the District Court was proper. It will also be noted (44 Ll. L. Rep., p. 321) that the appeal was held before "Lord Justice Scrutton, Lord Justice Lawrence and Lord Justice Greer, sitting with Vice-Admiral W. Nunn and Captain W. E. Whittingham, Nautical Assessors."

The opinions of the Lord Justices clearly show the great reliance placed by the court on the expert nautical advisers with whom they sat. Thus Lord Justice Scrutton said:

> "We have asked our assessors this question: 'Assuming that the master of the Florida, in dense fog, heard a long blast from a vessel he could not see but which he estimated, to be 25 deg. to 30 deg. on his port bow, and very close, and then hard-a-ported, was such hard-a-porting a breach of good seamanship?' They answer: 'Yes, we consider Florida hard-a-porting to be a breach of good seamanship if she knew that the other ship was under way and she could not know whereabouts the other ship was and in what direction heading. The Florida was also to blame for not stopping.' So that we have four expert assessors all advising that the hard-a-porting of the Florida, under the circumstances, was a breach of good seamanship."

After discussing a further fault contended for by the appellant, Lord Justice Scrutton continued:

> "Again, I think that is largely a matter of seamanship, and we asked our assessors this question:

'The Glorious before dense fog, was steering 70 deg. and last saw the Florida seven miles off on her port quarter steering 75 deg. The Glorious then turned reciprocal but altered to 230 deg., and on hearing a distant whistle assumed the Florida to be more than 40 deg. on her port bow and kept her 230 deg. course. Apart from the blame for not stopping her engines on hearing the whistle, was the course of 230 deg. in dense fog a breach of good seamanship?' The assessors answer: 'No. We do not consider the course of 230 deg. a breach of good seamanship. The Glorious apparently took this course in order to run out of the fog, and it would eventually take her out of the track of shipping, so that, apart from the blame for not stopping her engines on hearing the whistle, we do not consider the course of 230 deg. a breach of good seamanship.' "

Similarly, Lord Justice Lawrence in his opinion, stated:

"The learned Judge has considered those reasons with the assistance of the Elder Brethren, and has come to the conclusion that the hard-a-port helm action taken by the Florida was bad seamanship. We have asked our assessors the question whether the hard-a-porting in the circumstances was good or bad seamanship, and we have received their answer that it was bad seamanship. Thus we have a finding by the learned Judge, by the Elder Brethren and by our assessors, that the hard-a-porting was bad seamanship. In those circumstances, the only course for this Court to adopt is to say that the finding of the Court below ought not to be disturbed."

It may well be proper for courts sitting with skilled nautical advisers to indulge in refinement as to the degree of fault applicable to two vessels in a case of collision.

The practice in this country does not afford such assistance to the judges either in the court of first instance or upon appeal. It is submitted that the rule laid down by this court in *The Atlas, supra,* and followed by all courts in this country ever since is the sound one and that the court below erred in departing therefrom.

The instant case is the first decision in this country apportioning damages under the Brussels Convention, and it is the first decision in modern times of any admiralty Court in this country apportioning damages otherwise than each vessel bearing 50% of the total damage, except the *Margaret-Manchester Merchant,* 30 F. (2d) 923 (C. C. A. 3), in which case the Court, upon rehearing, modified its previous decision and reinstated the decree of the District Court requiring each vessel to bear 50% of the total damages.

As the directions of this Court are mandatory to the effect that our Admiralty Courts may not attempt to apportion the degree of fault attributable to vessels at fault in collision, the prerequisite to a proper application of Article IV of the Brussels Convention could not be performed.

The Brussels Convention not being applicable in full, and the parties to this litigation being of different countries, this Court should administer the maritime law as accepted and applied by our law, *i. e.,* innocent cargo should recover in full (*The Scotland,* 105 U. S. 24).

We submit, therefore, as Article IV of the Brussels Convention cannot be applied by the courts of this country in its entirety or in accord with the intention of the signatories of that Convention it should not be applied at all.

POINT II.

IT IS CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES TO PERMIT ARTICLE IV OF THE BRUSSELS CONVENTION TO BE INTERPOSED AS A DEFENSE AGAINST A CLAIM BY INNOCENT CARGO.

A. It is the settled public policy of the United States that an innocent party who has suffered damage due to the negligence of joint tort feasors may recover *in solido* against any one of the joint tort feasors.

In *Wabash, St. Louis & Pacific Railway Co.* vs. *Shacklet*, 105 Ill. 364, the contrary English doctrine was considered, the authorities in this country analyzed and reviewed, and the Court held that it was contrary to public policy to deprive an innocent party, who had received an injury at the hands of two or more wrongdoers, of the right of recovery in full from each. This case was approved and followed by this Court in *Little* vs. *Hacket*, 116 U. S. 366.

In *The Alabama and The Game-Cock*, 92 U. S. 695, this Court held that the cargo owner was entitled to recover full damages and that

> "He (cargo owner) ought not to suffer loss by the desire of the Court to do justice between the wrongdoers" (p. 697).

In the recent case of *Galef* v. *United States*, 25 F. (2d) 134, this question of public policy was considered and the Court refused to allow the application of German law although the collision occurred in German waters. It was urged that the German Commercial Code applied and that under this code the rights of the cargo against the ship were limited to one-third of the loss sustained by

cargo. The Court, District Judge Hale, held that cargo could recover in full and said:

> "* * * I think the policy under which our courts take cognizance of actions in tort, based on foreign laws, is that, if the United States has jurisdiction of the necessary parties and can do substantial justice between them, in accordance with its own method of procedure, the courts will enforce the foreign law, if it is 'not contrary to the public policy of the forum, to abstract justice or pure morals, or such as may injure the state or its citizens.' Cases bearing upon this subject are grouped in *12 Corpus Juris*, 452.
>
> *The government has refused, I believe, to ratify the rule laid down by the Brussels Convention as to proportional liability in collision cases.* Our courts have recognized the difficulty of determining the degree of fault to be attached to each ship, and *the injustice of requiring the innocent cargo owner to proceed against two joint feasors, one of whom may be beyond his reach;* and our courts have allowed the cargo owner to collect all his damages from either wrongdoer, leaving to that wrongdoer the right to pursue his remedy against the other for a contribution. In *Phoenix Ins. Co.* v. *The Atlas*, 93 U. S. 302, 317 (23 L. Ed. 863), the court discussed the English rule announced in *The Milan*, Lushington, Adm. 401. In speaking for the Supreme Court, Mr. Justice Clifford said:
>
> 'Even suppose that the case of *The Milan* is a correct exposition of the Admiralty Law, as administered in the jurisdiction where the decision was made, still it cannot control the question before the court, for the reason that the rule *of practice* here is different, as is clearly shown by the judgment of this Court delivered at the last term

of the Court, *The Alabama* and *The Game Cock*, 91 U. S. 695 (23 L. Ed. 763).'

It appears that, to hold the German statute applicable here, as contended for by the respondent, this court would be obliged to say that a negligent shipowner could relieve himself by stipulation from making compensation for his wrongdoing, and thus deprive the cargo owner of all remedy for the greater part of his loss. I think this would be to endorse a law injurious to the citizens of the United States and 'contrary to the public policy of the forum, to abstract justice and pure morals.' For the Harter Act relieves a shipowner from liability for negligence of the officers and crew under certain carefully restricted conditions and prohibits the owner to stipulate against his own negligence. The question whether or not an act gives rise to liability to tort, I think, depends on the *lex loci delicti,* the *lex fori* controlling in matters of procedure and remedy. *Pritchard* v. *Norton,* 106 U. S. 124, 129, *et seq.,* 1 S. Ct. 102, 27 L. Ed. 104; *Bank* v. *Donally,* 8 Pet. 361, 8 L. Ed. 974; *Ruhe* v. *Buck,* 120 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439; *Burchard* v. *Dunbar,* 82 III, 450, 25 Am. Rep. 334; *Hoadley* v. *Transportation Co.,* 115 Mass. 304, 16 Am. Rep. 106; *12 Corpus Juris,* 447. Our courts have held that the law controlling all matters pertaining to the remedy is the *lex fori.*

It will be found that both American and German law recognize negligent collision as a tort giving the injured party a right to damages; they differ only as to the amount of damages recoverable from each wrongdoer, and in such a situation I think, the law of the forum applies. *The method of apportioning* damages against *tort feasors* in collision is a matter of *practice. Phoenix Ins. Co.* v. *The Atlas,* 93 U. S. 302, 23 L. Ed. 863, *supra.*" (Italics ours.)

The foregoing is applicable here and our courts should refuse to permit "the injustice of requiring the innocent cargo owner to proceed against two joint feasors, one of whom may be beyond his reach." As stated by the Court, this is, we submit, "contrary to the public policy of the forum, to abstract justice or pure morals."

See also *The Atlas*, 93 U. S. 302, *supra; The New York*, 175 U. S. 187, 209.

The Eagle Point, 142 Fed. 453 (C. C. A. 3, cert. den. 210 U. S. 644), and *Royal Mail Steam Packet Co.* vs. *Companhia de Navegacao Lloyd Brasileiro*, 31 F. (2d) 757, are to the contrary. However, in neither of these cases did the party claiming the benefit of foreign law seek the Courts of the United States and the advantages of the United States law, as the owners of the MANDU here are seeking the boon of our limitation statutes. Furthermore, in neither case was the question of public policy as to the enforcement of foreign law, contrary to our well established practice, considered.

In passing, it should be noted that Hough, J., in *The Titanic*, 204 Fed. 298, and the Circuit Court of Appeals for the Second Circuit in *Yang-Tsze Ins. Ass'n, et al.* v. *Furness, Withy & Co., Ltd.*, 215 Fed. 859 at pp. 865-867, questioned the correctness of the decision in *The Eagle Point, supra.*

B. It is contrary to the public policy of the United States to allow a foreign subject to seek the refuge of our courts and the benefit of our protective statutes and at the same time have the benefit in other respects of foreign law.

The owner of the MANDU is a Brazilian corporation and has filed a petition for limitation of its liability in the United States District Court, Eastern District of New York, and prayed that it be allowed the benefit of our limitation of liability statutes. The record is silent as to

what, if any, limitation of liability statutes are in force in Brazil.

This Court in an analogous situation has held that when the owner of a foreign vessel comes into the courts of the United States and invokes the benefits of our limitation of liability statutes, foreign law may not be applied as to other phases of the case, but that the entire controversy should be determined according to the law of the United States.

La Bourgogne, 210 U. S. 95.

In this case a French vessel was sunk in collision and various claims were filed for personal injuries, loss of life and cargo damage. Of course, it is true that a French vessel is considered to be French territory and that ordinarily the law of France would be applied with regard to a tort occurring on French territory. It was accordingly urged that, "as all the claims arose exclusively because of damage done to persons or property on board the steamship, the fault of that vessel should be decided by the theory which would be applied in the courts of France." It was then urged that under French law the vessel was not at fault and should be completely exonerated from all liability. This Court said:

> "* * * Be that as it may, however, we are of the opinion that we must decide the case before us by the international rule as interpreted in the courts of the United States, and not by the practice under that rule prevailing in the French courts, if there be a difference between the two countries. The petitioner here is seeking the benefits conferred by statute of the United States, which it could not enjoy under the general maritime law. Strictly speaking, the application for a limitation of liability is in effect a concession that liability exists, but, because of the ab-

sence of privity or knowledge, the benefits of the statute should be awarded. It is true that under the rules promulgated by this court the petitioner is accorded the privilege not only of seeking the benefits of the statute, but also of contesting its liability in any sum whatever. This does not, however, change the essential nature of the proceeding. As the petitioner called the various claimants into a court of admiralty of the United States to test whether, in virtue of the laws of the United States, it should be relieved in part at least of liability from the consequences of the acts of its agents, and as the international rules have the force of a statute, we think the issues presented were of such a character as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States and not otherwise" (p. 116).

So in the instant case, the owner of the MANDU by a petition for limitation of liability called the various claimants into a court of admiralty of the United States to test whether, by virtue of the laws of the United States, it should be relieved, in full or in part, of liability from the consequences of the acts of its agents, and it is, therefore "essential" that the measure of its liability to innocent cargo "should be tested by the law as administered in the courts of the United States and not otherwise".

Likewise the decision of the court below is contrary to the holding of this Court in *The Titanic*, 233 U. S. 718. There, only a single vessel of British nationality was concerned. It was urged in the District Court that inasmuch as the law of England differed from that of the United States with respect to the amount of the vessel owner's liability that the law of England should govern as to the amount of such owner's liability.

It was also urged that causes of action for death at sea due to collision or other causes are governed by the law

of the flag and that upon fundamental principles the British law as the *lex loci delicti* fixed the extent of the vessel owner's liability.

The Circuit Court of Appeals certified to this Court the following question:

"C. Will the courts of the United States in such decisions enforce the law of the United States or of the foreign country in respect to the amount of such owner's liability."

This court answered the foregoing question by holding that the law of the United States should be applied as to the amount of liability. The court specifically approved *La Bourgogne, supra,* and with respect to the limitation of liability statute, said:

> "This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States. *Emery* v. *Burbank,* 163 Mass. 326, 328" (p. 733).

The damages claimed here amount to $365,000 (R. 101). The value of respondent's vessel (MANDU) has been adjudged to be $260,000, and respondent sought to receive and has received immunity from any liability in excess of this sum plus certain interest (R. 2173). We submit that inasmuch as the owner of the MANDU has sought the benefit of our law for limitation of liability purposes and to cut down its damages substantially by reason of our limitation statutes, its request that in another respect our Federal Courts should apply a foreign law (a law which the United States has refused to adopt for thirty years) should be denied. Innocent cargo, we submit, should be paid in full under our law up to the limitation value of the wrongdoing vessel.

POINT III.

IF IT SHOULD BE HELD THAT ARTICLE IV OF THE BRUSSELS CONVENTION PROPERLY MAY BE APPLIED BY COURTS OF THE UNITED STATES TO DEPRIVE AN INNOCENT CARGO OWNER OF FULL DAMAGES FROM A WRONGDOER, THE COURT BELOW, NEVERTHELESS, SHOULD HAVE APPORTIONED DAMAGES ACCORDING TO THE MOIETY RULE.

We have shown above under Point I that this Court held that it is "utterly impracticable" for our courts to apportion fault between two colliding vessels other than equally. We have also pointed out that this Rule is so well settled that the Circuit Court of Appeals for the Third Circuit in the *Margaret-Manchester Merchant*, 30 F. (2d) 923, on its own motion, modified its previous decision wherein it did apportion damages other than equally to change the holding to accord with the moiety rule.

Article IV of the Brussels Convention does not provide only for apportionment of liability according to the degree of fault. It also provides (R., p. 182) that

> "If, having regard to the circumstances, it is not possible to establish the degree of the respective fault, or if it appears that the faults are equal, the liability is apportioned equally."

It being the settled law of this country that it is "utterly impracticable" (*i. e.*, not possible from a practical viewpoint) "to establish the degree of the respective faults," the court below erred in apportioning fault 80% and 20% as it did. Thus, even if the Brussels Convention be applied, the fault should have been apportioned equally and the 50% recovery allowed to cargo by the District Court should not have been disturbed by the Circuit Court of Appeals for the Second Circuit.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the writ of certiorari sought herein and review the decision of the Circuit Court of Appeals for the Second Circuit to determine:

1. Whether Article IV of the Brussels Convention properly can be applied by a court of the United States in an action brought by a foreign vessel owner seeking the benefits of our limitation of liability statutes; and

2. Whether, even if Article IV of the Brussels Convention may be applied by a Court of the United States, apportionment of fault between colliding vessels other than equally properly may be made.

Respectfully submitted,

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New York, November 15, 1940.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 581.

In the Matter

of

The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the Steamship "MANDU".

GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Petitioner,

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION OF THE GREAT AMERICAN INSURANCE COMPANY, ET AL. FOR A WRIT OF CERTIORARI.

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LEONARD J. MATTESON,
Of Counsel.

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GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Petitioner.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION OF THE GREAT AMERICAN INSURANCE COMPANY, ET AL. FOR A WRIT OF CERTIORARI.

The questions stated in the petition for a writ of certiorari (pp. 5-6) presented to this Court by The Great American Insurance Company, *et al.*, for brevity called Great American, rest upon assumptions and propositions which are unsound. These questions assume that Companhia de Navegacao Lloyd Brasileiro (hereafter for brevity called Lloyd Brasileiro) voluntarily sought the jurisdiction of the United States Court; that when Lloyd Brasileiro came into the United States Court it consented that the substantive law of the United States become applicable to a tort which arose within the territorial jurisdiction of Brazil; that it is against the public policy of the United States to apportion fault between these vessels even though the law of Brazil where the collision occurred provides that fault should be so apportioned; and that

since it is concluded that it is impossible for the Courts of the United States to apportion fault as required by the Brazilian law, it follows that our Courts should disregard the Brazilian law and apply our own.

I.

The Companhia de Navegacao Lloyd Brasileiro did not voluntarily seek the jurisdiction of the courts of the United States. It filed its petition for limitation of liability to protect itself from periodic suits which Great American brought against its S. S. "Mandu" and to protect its vessel, the "Mandu", from repeated arrests which were depriving it of the use of the "Mandu" and which were causing serious damage to its business.

The facts relating to the proceedings for limitation of liability are stated in the Petition of Lloyd Brasileiro for a writ of certiorari* filed in this Court after Great American had filed its petition for a writ of certiorari. From this statement it appears that Lloyd Brasileiro did not seek limitation until its vessel had been twice arrested for alleged claims of Great American. The first libel for $217,140 was filed on June 30, 1930. The vessel was then arrested and, upon bail being given, was released from arrest. This libel was later amended on October 22, 1930, after the "Mandu" had made a round trip to Brazil, so as to increase the damages to $225,872.31 (Lloyd Brasileiro Petition, p. 2). The second libel for $137,695.83, was filed on October 25, 1930, and the "Mandu" was arrested the second time. Since the filing of the second libel brought the aggregate damages demanded to $363,568.14, a sum far exceeding the value of the "Mandu" (Lloyd Brasileiro Petition, p. 3), Lloyd Brasileiro had no

* No. 585, October Term, 1940.

alternative other than to seek relief through a petition for limitation of liability. To say that under these circumstances Lloyd Brasileiro voluntarily sought the jurisdiction of the courts of the United States when it filed its petition for limitation of liability, is not in accordance with the facts (Lloyd Brasileiro Petition, pp. 4-8).

Limitation of liability does not affect substantive rights, and is a defensive remedy. *The Titanic*, 233 U. S. 718, 731; *Restatement Conflict of Laws*, §411. It is a defense which may be set up by answer or by a petition for limitation of liability. *Langnes* v. *Green*, 282 U. S. 531; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20. Congress by statute recognized the defensive nature of limitation of liability when by the Act of June 5, 1936, it amended R. S. 4285, 46 U. S. C. §185; Act of June 5, 1936, c. 521, §3, 49 Stat. 1479, amending R. S. 4285, and thereby made it a condition that if the defense is asserted by petition for limitation of liability, such a petition must be filed "within six months after a claimant shall have given to or filed with such owner written notice of claim", etc. When, therefore, the owner of the "Mandu" invoked limitation of liability, it did not "seek the refuge of our courts" as is stated in the petition of Great American (Great American Petition, pp. 5, 6). It merely filed a pleading by way of defense to protect itself from being harassed by numerous libels and in order to place itself in a position where it could carry on its business without continued interruption caused by judicial arrests. Certainly under these circumstances it would be most unjust to penalize a foreigner, so that he shall be held to liabilities created by the law of the forum rather than to liabilities created by the lex loci, merely because he has taken advantage of a defense designed to prevent such harassing tactics as those which were pursued by Great American in this case.

II.

A foreign shipowner does not by coming into our courts submit himself to the subjective law of the United States. The question as to what substantive law is applicable in a case involving any collision is determined by the law of the place where the collision occurred.

The collision occurred within the territorial waters of Brazil. Hence the law of Brazil is applicable.

In *Smith* v. *Condry*, 42 U. S. (1 How.) 28, this Court said:

> "The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes, then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts" (p. 32).

See also:

The Scotland, 105 U. S. 24, 29.

See also:

Restatement, Conflict of Laws, §409:

> "§409. Liability for an alleged tort caused by collision in the territorial waters of a state is governed by the law of that state."

III.

The cause of action arose under Brazilian Law, which is the lex loci. The Brussels Convention is a treaty to which both Germany and Brazil are parties and is the source of the law of Brazil which controls in the determination of the rights and liabilities of the parties. Since the right is created by the law of the place of the wrong, it is measured by that law.

Both Courts below found that the Brussels Convention is a treaty to which both Germany and Brazil are parties and is the source of the law which controls in the determination of rights and liabilities which flow out of a wrong committed on Brazilian territorial waters (R. 214, 640; R. 738g; R. 2205, 2208). We assume that this concurrent finding of fact will not be disturbed by this Court. It appears, therefore, that the cause of action here involved arose under Brazilian law and under the Brussels Convention, a treaty to which both the German and the Brazilian nations were signatory.

It was admitted at the trial that both Brazil and Germany had adopted the Brussels Convention (R. 232).

The collision out of which the cause of action arose was between a German vessel and a Brazilian vessel. The law of the two countries was the same, viz.: The Brussels Convention, which provides in Article 1:

> "Where a collision occurs between seagoing vessels or between seagoing vessels and vessels of inland navigation, the compensation due for damages caused to the vessels or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place" (R. 182).

(A translation of the Brussels Convention is printed in the appendix.)

In Restatement of Conflict of Laws, §412, and the Commentary, it is stated:

> "Since the right is created by the law of the place of the wrong, it is measured by that law."

See also:

> Sutherland on Damages, Vol. 1, §7;
> Goodrich on Conflict of Laws, §91.

In *Sullivan* v. *Nitrate Producers S. S. Co., Ltd.*, 262 F. 371 (C. C. A. 2), Judge Hough, writing for the Circuit Court of Appeals for the Second Circuit, cited *The Eagle Point*, and said:

> "But it turned out on the evidence that to this injury, received on the high seas by a member of the crew and on a British vessel, British law alone was applicable (*The Eagle Point*, 142 F. 453, 73 C. C. A. 569), and under that law libellant has no right to an indemnity * * *" (at p. 373).

Article 4 of the Brussels Convention reads as follows:

> "ART. 4. If two or more vessels are in fault, the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.
>
> The damages caused, either to the vessels or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board, are

borne by the vessels in fault in the above proportions, and even to third parties a vessel is not liable for more than such proportion of such damages.

In respect of damages caused by death or personal injuries, the vessels in fault are jointly as well as severally liable to third parties, without prejudice, however, to the right of the vessel which has paid a larger part than that which, in accordance with the provisions of the first paragraph of this article, she ought ultimately to bear, to obtain a contribution from the other vessel or vessels in fault.

It is left to the law of each country to determine as regards such right to obtain contribution, the meaning and effect of any contract or provision of law which limits the liability of the owners of a vessel towards persons on board" (R. 182-3).

It is submitted that the Courts below were right when they held that the recovery in this case could not exceed that permitted by this article of the Brussels Convention.

IV.

The public policy of our law as to apportionment of fault is irrelevant. The foreign law determines the apportionment of damages. Since it has been conceded that the Brussels Convention has been formally adopted by Brazil, it constitutes the public policy of that country. It is immaterial that public policy of Brazil differs from our own.

In *The Eagle Point*, 142 F. 453 (C. C. A. 3), certiorari denied, 201 U. S. 644, the case arose out of a collision which occurred on the high seas between two British vessels. Certain owners of cargo sought recovery in full on the same theory advanced here. The District Court

held that the amount of the damages was a matter of remedy and not of right and allowed full damages. The Circuit Court of Appeals reversed, holding that as both vessels were British, the right of the cargo owners, who were not British, was determined by British law, and cargo could not recover a greater amount of damages than the sum provided under British law.

After citing *The Eagle Point* in *In re Pennsylvania R. Co.*, 48 F. (2d) 559, at page 565, the Circuit Court of Appeals for the Second Circuit, said:

> "The law of the place where the tort occurs also controls the extent of the recovery."

In *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 51 F. (2d) 1007 (C. C. A. 2), affirmed 285 U. S. 413, the Court, after citing *The Eagle Point*, said:

> "When two vessels of the same nationality collide upon the high seas, the law enforced by the forum will be the law of the flag."

Galef v. *United States*, 25 F. (2d) 134, much relied upon by Great American, is not to the contrary. It is true that the liability there arose out of a collision which occurred in German territorial waters, the harbor of Hamburg, but the liability sued on was not created by the German law, because the cause of action was against the United States. The suit was between an American citizen and the United States. The American citizen owned cargo which was damaged by a ship, the S. S. "Magmeric", the property of the United States. There was no cause of action except that created by the law of the United States. *The Western Maid*, 257 U. S. 419. The liability sued upon in that case was admittedly created by the Suits in Admiralty Act, 46 U. S. C., §742, a statute

of the United States enacted March 9, 1920 (c. 95, §2, 41 Stat. 525). Without the Suits in Admiralty Act there was no liability of the United States. Indeed, in *Galef* v. *United States*, 25 F. (2d) 134, the Court placed its decision on the ground the liability to be enforced was that created by the United States and for this reason held that the Court was not bound by the German law. The Court said:

> "The theory of the defense is that the rights of the parties are governed strictly and solely by the German statute. I cannot agree to this proposition. The 'Magmeric' is the property of the United States and is not subject to the laws of Germany. The law is stated in the Suits in Admiralty Act" (pp. 135, 136).

It is true that the right to assert that the whole liability is subject to limitation, if the shipowner should seek limitation, is determined by the law of the forum, but this is far from saying that the question of exoneration is to be governed by the law of the forum. The issue of exoneration must be decided first before there is any liability to limit. That there are two issues involved in every limitation proceeding is well settled. *The Rambler*, 290 F. 791 (C. C. A. 2); *The 84 H*, 296 F. 427, 432. In the first of these cases Judge Hough, speaking for the Circuit Court of Appeals for the Second Circuit, said:

> "The first duty of the court is to ascertain whether any liability exists, and if none exists there is the end of the matter." *The Rambler*, 290 Fed. 791, p. 792.

In *The Titanic*, 233 U. S. 718, 732, this Court said:

> "It is true that the Act of Congress does not control the conduct of a British ship on the high seas. See *American Banana Co.* v. *United Fruit Co.*, 213

U. S. 347, 356. It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 478, 480. Dicey, Conflict of Laws, 2d ed. 647."

But we know of no case which holds that there is a liability which may be sued on in our courts where there is no liability created by foreign law.

In the present case, neither the United States nor a citizen of the United States is involved. The only law which exists that could create a liability for a tort growing out of a collision occurring in the territorial jurisdiction of Brazil when the two vessels involved are German and Brazilian, is the Brussels Convention. That became the law of Brazil when Brazil accepted the Brussels Convention (p. 5, *supra*). The circumstance that certain American insurance companies had insurance on fractional cargo interests and paid losses on these fractional interests, does not change the legal situation. A surety stands in the shoes of his principal; his rights are the rights of the principal; defenses good against the principal are good against him. *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.*, 117 U. S. 312; *U. S.* v. *American Tobacco Co.*, 166 U. S. 468. No greater liability can be imposed.

In *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, 547, this Court said:

"Whatever variations of opinion and practice there may have been, it is established in the law of this

court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478, 480. (A limitation of liability may stand on different grounds. *The Titanic*, 233 U. S. 718.) The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail."

V.

The Great American Insurance Company argues that because it is impossible for our courts to enforce the Brussels Convention, which is the basis of the liability claimed, our courts should disregard the foreign law and enforce our own law. If it is impossible for our courts to enforce a liability created by a foreign law in accordance with the provisions of that law, then our courts can give no remedy in such a case.

Under Point I of the brief of The Great American Insurance Company the argument is made, apparently in support of all five questions propounded in its petition, that because "it is impossible for a court of the United States properly to apply Article IV of the Brussels Con-

vention", that law should have been disregarded and the law of the United States should have been applied in the present case. The fact that Article IV of the Brussels Convention was in fact applied by the Court below in this case seems to be a complete answer to the argument that it is impossible for a court of the United States to apply it. The District Court concluded that both vessels were equally at fault. The Circuit Court of Appeals, however, reversed that conclusion and apparently found no difficulty in reaching its conclusion that the faults of the "Denderah" were four times as great as those of the "Mandu". Both Courts found in accordance with the provisions of Article IV of the Brussels Convention that the liability of the "Mandu" was only in proportion to her degree of fault. The supposed difficulty stated in Great American's petition and supporting brief, that our courts cannot apportion fault other than equally, exists only in counsel's mind. The Court did apportion fault and, although we are convinced no fault should have been allotted to the "Mandu", it cannot be said that the Court performed an impossible task when it did so. The Circuit Court of Appeals did not consider that it was performing an impossible task when it apportioned liability four-fifths to the "Denderah" and one-fifth to the "Mandu" because by Article 4 of the Brussels Convention it is provided that if it is impossible "to establish the degree of the respective faults", the liability is to be apportioned equally. The very fact that the Court did not apportion the fault equally is convincing proof that the Court did not consider it impossible to enforce the Brussels Convention.

But admitting, for the sake of argument, that it is impossible for our courts to apply Article IV of the Brussels Convention, then the consequence is, not that the Court should apply our law but, that "no action will be

allowed". It is so stated by Professor Beale in his Treatise on Conflict of Laws, page 1311:

> "If the action allowed by the statute of the state of injury is such that no remedy can be had in the forum, as for instance because an annuity is given by the law of the state of injury, which cannot be secured by judgment in a common-law state, no action will be allowed."

This statement is merely a summary of this Court's decision in *Slater* v. *Mexican National R. Co.*, 194 U. S. 120. In that case, in an opinion by Mr. Justice Holmes, at pages 126, 127, this Court in disposing of an appeal from a Federal court in Texas which had dealt with an action for unlawful death which occurred in Mexico, held that because the United States courts were without power to award the only remedy for unlawful death given by the law of Mexico, the suit must be dismissed. The cause of action arose under a law of Mexico, which did not provide for the recovery of a lump sum of money for unlawful death, but for an annuity to be paid to the dependents of the decedent. The Circuit Court held that, as it was without machinery to carry into effect the provisions of the Mexican law, the annuity might be amortized and the jury could award a lump sum. The Circuit Court of Appeals reversed this judgment, on the ground that our courts could not provide a remedy which differed from that created by the law of Mexico. This Court affirmed the judgment of the Circuit Court of Appeals on the ground that, since the only source of obligation imposed on the defendant was the law of Mexico, the defendant could not be denied the benefit of whatever limitations on his liability that law imposed.

The Court then held that there was no cause of action which could be enforced in our Courts.

In *Davis* v. *Mills*, 194 U. S. 451, also an opinion of Mr. Justice Holmes, and in *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478, the Court enforced the same principle as that announced in *Slater* v. *Mexican National R. Co.*, 194 U. S. 120. The view announced by Mr. Justice Holmes in the *Slater* case has ever since been regarded as settled law. *Ormsby* v. *Chase*, 290 U. S. 387; *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 203.

In the petition for a writ of certiorari filed in this case by Lloyd Brasileiro,* the point is made that the Courts below should have refused to take jurisdiction of this case because it is in substance an action between Germans and Brazilians based on a collision which occurred in the territorial waters of Brazil. The argument now made for Great American, is that the courts of the United States are not able to enforce the liability created by the laws of Brazil, hence the courts of the United States should decline to enforce that law and enforce the law of the United States. We submit that the result is just the contrary—if the courts of the United States cannot enforce a foreign law, they refuse to take jurisdiction of the cause of action at all. This argument thus strongly supports the position of Lloyd Brasileiro and the prayer of its petition for certiorari for review of this case, so as to enable this Court to reverse the first decision of the Circuit Court of Appeals and to restore the decree of the District Court dismissing the libels and claim of Great American and allowing Lloyd Brasileiro to withdraw its petition for limitation of liability.

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* No. 585, October Term, 1940.

CONCLUSION.

The purpose of all five of the questions which Great American submits for the consideration of this Court, is to impose a greater liability on Lloyd Brasileiro than that created by Brazilian law. Since this Court has in previous decisions answered these questions adversely to Great American's contentions, it is submitted that the petition of Great American should be denied.

Respectfully submitted,

FRANK J. McCONNELL,
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JAMES D. BROWN,
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Of Counsel.

Appendix.

TRANSLATION OF THE BRUSSELS CONVENTION.

(Printed in Record at p. 182.)

Signed at Brussels, September 23rd, 1910.

ART. 1. Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damages caused to the vessels or to any things or persons on board thereof, shall be settled in accordance with the following provisions, in whatever waters the collision takes place.

ART. 2. If the collision is accidental, if it is caused by *force majeure*, or if the cause of the collision is left in doubt, the damages are borne by those who have suffered them.

This provision is applicable notwithstanding the fact that the vessels, or any one of them may be at anchor (or otherwise made fast) at the time of the casualty.

ART. 3. If the collision is caused by the fault of one of the vessels, liability to make good the damages attaches to the one which has committed the fault.

ART. 4. If two or more vessels are in fault, the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.

The damages caused, either to the vessels or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board, are borne by the vessels in fault in the above proportions, and even to

third parties a vessel is not liable for more than such proportion of such damages.

In respect of damages caused by death or personal injuries, the vessels in fault are jointly as well as severally liable to third parties, without prejudice, however, to the right of the vessel which has paid a larger part than that which, in accordance with the provisions of the first paragraph of this article, she ought ultimately to bear, to obtain a contribution from the other vessel or vessels in fault.

It is left to the law of each country to determine as regards such right to obtain contribution, the meaning and effect of any contract or provision of law which limits the liability of the owners of a vessel towards persons on board.

ART. 5. The liability imposed by the preceding articles attaches in cases where the collision is caused by the fault of a pilot, even when the pilot is carried by compulsion of law.

ART. 6. The right of action for the recovery of damages resulting from a collision is not conditional upon the entering of a protest or the fulfillment of any other special formality.

All legal presumptions of fault in regard to liability for collision are abolished.

ART. 7. Actions for the recovery of damages are barred after an interval of two years from the date of the casualty.

The period within which an action must be instituted for enforcing the right to obtain contribution permitted by paragraph 3 of ART. 4, is one year from the date of payment.

The grounds upon which the said periods of limitation

may be suspended or interrupted are determined by the law of the Court where the case is tried.

The high contracting parties reserve to themselves the right to provide, by legislation, in their respective countries, that the said periods shall be extended in cases where it has not been possible to arrest the defendant vessel in the territorial waters of the State in which the plaintiff has its domicile or principal place of business.

ART. 8. After a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to the other vessel, her crew and passengers.

He is likewise bound so far as possible to make known to the other vessel the name of his vessel and the port to which she belongs, and also the names of the ports from which she comes and to which she is bound.

A breach of the above provisions does not of itself impose any liability on the owner of a vessel.

ART. 9. The high contracting parties whose legislation does not forbid infringements of the preceding article bind themselves to take or to propose to their respective Legislatures the measures necessary for the prevention of such infringements.

The high contracting parties will communicate to one another as soon as possible the laws or regulations which have already been or may be hereafter promulgated in their States for giving effect to the above undertaking.

ART. 10. Without prejudice to any conventions which may hereafter be made, the provisions of this convention do not affect in any way the law in force in each country with regard to the limitation of shipowner's liability, nor do they effect the legal obligations arising from contracts of carriage or from any other contracts.

ART. 11. This convention does not apply to ships of war or to Government ships appropriated exclusively to a public service.

ART. 12. The provision of this convention shall be applied as regards all persons interested when all the vessels concerned in any action belong to States of the high contracting parties, and in any other cases for which the national laws provide.

Provided always that—

1. As regards persons interested who belong to a non-contracting State, the application of the above provisions may be made by each of the Contracting States conditional upon reciprocity.
2. Where all the persons interested belong to the same State as the court trying the case, the provisions of the national law and not of the convention are applicable.

ART. 13. This convention extends to the making good of damages which a vessel has caused to another vessel, or to goods or persons on board either vessel, either by the execution or non-execution of a manoeuvre or by the non-observance of the regulations, even if no collision had actually taken place.

ART. 14. Any one of the high contracting parties shall have the right, three years after this convention comes into force, to call for a fresh conference with a view to possible amendments, and particularly with a view to extending, if possible, the sphere of its application.

Any Power exercising this right must notify its intention to the other Powers, through the Belgian Government, which will make arrangements for convening the conference within six months.

ART. 15. States which have not signed this convention are allowed to adhere to it on request. Such adhesion

shall be notified through the diplomatic channel to the Belgian Government, and by the latter to each of the other Governments; it shall become effective one month after the sending of the notification by the Belgian Government.

ART. 16. This convention shall be ratified.

After an interval of at most one year from the day when the convention is signed, the Belgian Government shall place itself in communication with the Governments of the high contracting parties which have declared themselves prepared to ratify the convention, with a view to deciding whether it should be put into force.

The ratifications shall, if so decided, be deposited forthwith at Brussels, and the convention shall come into force a month afterwards.

The protocol shall remain open another year in favour of the States represented at the Brussels Conference. After this interval they can only adhere to it on conforming with the provisions of Article 15.

ART. 17. In the case of one or other of the high contracting parties denouncing this convention, such denunciation shall not take effect until a year after the day on which it has been notified to the Belgian Government, and the convention shall remain in force as between the other contracting parties.

ADDITIONAL ARTICLE.

Notwithstanding anything in the provisions of Article 16, it is agreed that it shall not be obligatory to give effect to the provisions of Article 5, establishing liability in cases where a collision is caused by the fault of a pilot carried by compulsion of law, until the high contracting parties shall have arrived at an agreement on the subject of the limitation of liability of shipowners.

NOV 20 1940
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 585

In the Matter

of the

Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, for exemption from or limitation of liability, as owner of the Steamship "MANDU",

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner-Shipowner,

THE GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Respondents-Cargo Claimants.

PETITION OF COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRANK J. McCONNELL,
Proctor for Petitioner Companhia de Navegacao Lloyd Brasileiro.

JAMES D. BROWN,
T. CATESBY JONES,
LEONARD J. MATTESON,
Of Counsel.

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IN THE

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Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, for exemption from or limitation of liability, as owner of the Steamship "MANDU",

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner-Shipowner,

THE GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Respondents-Cargo Claimants.

Shipowner's Petition for Certiorari.

The petition of Compania de Navegacao Lloyd Brasileiro, owner of the S. S. "Mandu", for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

STATEMENT.

Since The Great American Insurance Company has filed a petition praying for a writ of certiorari, this petitioner desires that the questions which it sets forth below shall be reviewed by this Court.

This proceeding originated because of a suit in admiralty brought by The Great American Insurance Company, a corporation created by the laws of the State of

New York against the Brazilian S. S. "Mandu" under two libels filed in the United States District Court for the Eastern District of New York to recover damages for loss and damage to cargo laden on the German steamship "Denderah", which was sunk on July 31, 1929, as a result of collision with the Brazilian steamship "Mandu". The collision occurred wholly within the territorial waters of Brazil in the Harbor of the Port of Santos. The first libel filed on June 30, 1930 alleged (a) that The Great American Insurance Company had insured unspecified quantities of cargo laden on the steamship "Denderah", had paid the owners thereof for losses, and had become subrogated to the owners' rights (Par. 6, R. 21); and (b) that certain other shipments of cargo laden on the steamship "Denderah" had been insured by other underwriters who paid the losses to the owners, became subrogated to their rights, and assigned their rights "for a valuable consideration" (R. 24) to the libellant, The Great American Insurance Company. The libellant demanded damages in the sum of $217,140 and caused the arrest of the "Mandu". Upon the filing of a stipulation for value by petitioner, a corporation created by the laws of Brazil, in the sum of $218,000 the "Mandu" was released from arrest and made a round trip to Brazil and return. Upon her return in October, 1930, an amended libel was filed on October 22, 1930 in which the amount of the demand was increased to $225,872.31 (R. 19, 39). In the amended libel it was again alleged that other underwriters had assigned their subrogated claims to the libellant "for a valuable consideration" (R. 39). In the amended libel, it was specified that the only owners of claims for goods on which the libellant had issued policies of insurance were Orenstein & Koppel, A.G. and Siemens Schuckert Werke, A.G. As to the shipments by these

companies the libellant alleged that it had paid the amount of its insurance to these assureds and

> "thereby became subrogated to all rights of its said assureds in said shipments to the extent of its said payments and to all their claims against said steamship 'Mandu' arising out of said collision and the said consequent loss and damage to said shipments" (R. 33).

Three days later, on October 25, 1930, The Great American Insurance Company filed an entirely new libel in which it alleged that it had acquired by assignment for *a valuable consideration* additional claims amounting to $137,695.83 and the "Mandu" was again arrested (R. 41). Thus the Brazilian owners of the "Mandu", your petitioner, were confronted with a demand for damages which had increased to the very large sum of $363,568.14, a sum far exceeding the value of the "Mandu".

Petitioner had filed exceptions to the first libel, but the only relief which it obtained from the District Court as a result of those exceptions (R. 26) was an order requiring the Great American Insurance Company to give the names of the assignors (R. 29). Petitioner was thus confronted with the necessity of securing some sort of restraining order to prevent further periodic arrests, since if such arrests continued it would be compelled to abandon its steamship service to the United States (R. 198) and this because of a collision which occurred in Brazilian waters, between vessels one of which was German and the other Brazilian. If these allegations that an American insurance company was in fact the beneficial owner of some of these claims by subrogation and of the remainder by assignment for a valuable consideration had been true, it would have been useless for

your petitioner to contest the jurisdiction, since in such case there could be no question of the jurisdiction. Even in cases of diversity of citizenship, if an assignment is valid and is for a valuable consideration, then the citizenship of the assignee determines the fact of citizenship for the purposes of the question of diversity of citizenship. *Barney* v. *Baltimore City*, 6 Wall. (73 U. S.) 280, at page 288. There was no way by which the petitioner could challenge the libel by excepting to the right of The Great American Insurance Company since Judge Campbell's decision was not appealable. Hence, unless petitioner was willing to forego all earnings of its vessel while it remained tied up at New York awaiting the decision of the court, as a practical matter petitioner was forced to obtain a restraining order by filing a petition to limit its liability. Accordingly, petitioner filed its petition for limitation of or exoneration from liability (R. 52) and on December 10, 1930, gave bail in the limitation proceeding in the sum of $281,650 "to obtain release of the 'Mandu' and to prevent her further arrest and to prevent any further disorganization of petitioner's business by any further libels * * *" (R. 178).

Thereafter The Great American Insurance Company filed a claim in the limitation proceeding, in which it again alleged that it was subrogated "to all [of Orenstein & Koppel's and Siemens Schuckert Werke's] claims against the steamship 'Mandu' arising out of said collision" (R. 90) and alleged that it held assignments acquired "for a valuable consideration" (R. 95) from other claimants, all of which were foreign and most of which were German. In the answer to the petition filed by The Great American Insurance Company it was alleged: "Thereafter, *for a valuable consideration*, said claims and causes of action, the details of which are particularized in this claimant's

aforesaid claim, were duly assigned to this claimant, and *this claimant is now the owner thereof*" (R. 109). The claim so filed by The Great American Insurance Company amounted to $364,008.14 (R. 101, 117). The allegations of the claim and of the answer, if true, were sufficient to support The Great American Insurance Co.'s right to sue. These allegations were that the original owners of the claims had really transferred the claims to The Great American Insurance Company. *Barney* v. *Baltimore City*, 6 Wall. (73 U. S.) 280, 288.

Nearly five years after the arrest of the "Mandu", upon the return of claimant's letters rogatory from Germany (later suppressed on motion, R. 143, 153, 161), petitioner obtained information indicating that The Great American Insurance Company was not the real party in interest and that claimant's interest by way of subrogation represented a small fraction only of such claims, and that no whole claim had been acquired by the claimant by subrogation. In this situation petitioner moved to amend its petition for exoneration from and limitation of liability in two particulars (a) by inserting in the petition new allegations (Article Fourteenth, R. 173) challenging claimant's right to sue and new allegations (Article Thirteenth, R. 172) pleading the Brussels Convention. In addition similar allegations were added to the objection to the claim (R. 174). Thereafter claimant filed exceptions to petitioner's amended petition and amended objection to claims (R. 208). These exceptions were overruled by the District Court by order entered June 10, 1936 (R. 217). The case then came on for trial.

At the trial the claimant offered no testimony supporting its right to sue except in respect of shipments by (1) Siemens Schuckert Werke, A. G. and (2) A. Borsig. With respect to the first, it appeared that the claimant's interest as insurer was merely a small fractional

part of that claim, that is, 2½% or only $164.69 out of a claim of $6,587.50 (R. 505). Therefore it appeared that the allegation of the claim that the claimant had become subrogated to the entire claim with respect to this shipment (R. 90) was untrue. With respect to the interest of A. Borsig, it appeared that the entire loss had been paid by a German insurance company which had assigned its interest to the Great American Insurance Company without consideration and solely for the purpose of permitting the Great American to collect for the benefit of the German insurance company (R. 375, 506). When this evidence had been given, the petitioner immediately moved to dismiss the libels and claim filed by The Great American Insurance Company and for permission to withdraw its petition for limitation of liability (R. 379, 383). The District Court did not consider the question of fault of the respective vessels but held (by decision dated July 21, 1937, Opinion, R. 500) that since The Great American Insurance Company was not the real party in interest (R. 505-6) and was not subrogated to any full claim (R. 506) it had no right to sue (R. 507). The Court thereupon indicated that the claim should be dismissed, but in order not to foreclose persons holding honest claims, it directed an extension of time, for sixty days, to permit them to file claims (R. 508). Decision was reserved on petitioner's motion for leave to withdraw the petition (R. 509). An order was entered in accordance with this decision (R. 510). The Court included in this order the following provision: "that in the event no such valid claims be filed within the said time, then the said motion to withdraw the petition shall be allowed and the present claim dismissed" (R. 512).

Thereafter a large number of new claims were filed within the time limited by the Court. Petitioner filed

exceptive allegations and exceptions to these claims (R. 598), and upon petitioner's motion, claimants were required to disclose the real owners of these claims (R. 620). As a result claimant filed a schedule (R. 622) on November 4, 1937, six years after the libel was filed, from which it was ascertained for the first time that the real parties in interest were sixty-four Germans, nine Brazilians, four Belgians, four Argentinians, three Frenchmen, three Hollanders, two Czecho-Slovakians, one Austrian, one Pole, one Englishman, one Swiss and one Portuguese. No United States citizen was interested. The sole interest of The Great American Insurance Company was 2½ percent of a claim of $6,587.50, or the insignificant sum of $164.59 out of claims aggregating more than $350,000. That is to say The Great American Insurance Company by reason of a small fractional interest in one comparatively minor claim had jeopardized petitioner's business by arresting petitioner's vessel and holding her to bail for hundreds of thousands of dollars.

Upon a hearing on petitioner's exceptions to the new claims the District Court found that: (1) There was "no longer before the Court any claim by any United States citizen" (R. 638); that "all of the claims are those of foreign underwriters" (R. 639); that the collision occurred in the territorial waters of Brazil between a German vessel and a Brazilian vessel (R. 636); and that the Court should "no longer retain jurisdiction of this action" (R. 64). (2) The new claims were barred by the two year limitation of the Brussels Convention (R. 640). (3) The new claims were barred by the Statute of Limitations of the State of New York (R. 640) and by laches (R. 641). The Court also said:

> "There is no doubt that the United States citizen (The Great American Insurance Co.) was endeavor-

> ing to represent foreign underwriters by allegations which were either not proven or shown to be false * * *" (R. 638).

The Court thereupon entered an order dismissing the claims and permitting the petitioner to withdraw its petition (R. 676-679).

The Great American Insurance Company appealed to the Circuit Court of Appeals for the Second Circuit (R. 686), and assigned errors (R. 708) which may be summarized as follows:

First: This Court erred in holding that a party libellant in an Admiralty proceeding must be the real party in interest and that an assignment without consideration and for the purpose of permitting an assignee to bring suit is insufficient to permit a suit to be brought in the Admiralty.

Second: The grounds for dismissal of the new claims in the final decree were insufficient.

Third: The Court should not have permitted the Brussels Convention to be pleaded.

The Circuit Court of Appeals held that the first of these assignments was well taken, but that the second and third were not well taken. The Court reversed the decree of the District Court and sent the case back for decision on the merits between the petitioner and The Great American Insurance Company (R. 738h). This petitioner then sought a stay of the mandate to provide an opportunity for an application to this court for a writ of certiorari. The Great American Insurance Company opposed that stay on the ground that the case should not be brought to

this court piecemeal. The Circuit Court of Appeals ruled with The Great American Insurance Company and sent the case back to the District Court for prompt hearing on the merits. After argument and consideration of the evidence the District Court filed its opinion on the merits (R. 2160) and made Findings of Fact and Conclusions of Law (R. 2173). The District Court held that the collision occurred as a result of the fault of both the S. S. "Denderah" and the S. S. "Mandu" and entered an interlocutory decree against the "Mandu" for half damages (R. 2171-3). The opinion of the District Court was not reported in the Federal Reporter system but appears in the Record (R. 2160-71) and may also be found in 1939 A. M. C. 1313.

This petitioner appealed from the decree holding the "Mandu" at fault and the petitioner liable for half damages. The Circuit Court of Appeals has now by its opinion (R. 2204; 114 F. (2d) 361) modified the decree of the District Court and held that the "Mandu" was not equally at fault with the "Denderah" for the collision; that the faults of the "Denderah" were "four times as serious in degree as those of the 'Mandu'"; and that this petitioner should not be held for half damages, but should respond for only one-fifth of the damages to cargo on the "Denderah" (R. 2208).

The questions which are presented for consideration by this Court arise out of the following errors of the Circuit Court of Appeals for the Second Circuit:

I.

Errors contained in the first decision of the Circuit Court of Appeals, which is reported under the style of *The Mandu*, 102 F. (2d) 459.

It is respectfully submitted that in its first decision the Circuit Court of Appeals erred in the following particulars:

(1) When it held that jurisdiction in Admiralty may be based on a bare assignment without transfer of ownership, given without any consideration whatsoever, not intended to transfer any beneficial interest, but merely a colorable assignment given solely for the purpose of permitting suit to be brought (R. 738d)—*The Mandu*, 102 F. (2d) 459, at page 462.

(2) When it held that it is proper for a Court of the United States to take jurisdiction of a controversy between foreigners (Germans and Brazilians) although no American interest is involved in the controversy, on the theory that the parties to the controversy "had no common home to which they might be sent to try their case" (R. 738e)—102 F. (2d) 459, at page 462.

(3) When notwithstanding the District Court's finding that the allegations in the libel that The Great American Insurance Company acquired claims on which it sued as owner thereof and for valuable considerations were false and misleading, the Circuit Court of Appeals nevertheless held that the petitioner was not misled "in any important particular" because petitioner must have known all along "that the title of the Great American In claims against Mandu, whether by subrogation or assignment,

came from foreign interests" (R. 738f). The Circuit Court of Appeals disregarded the fact that it was the allegations of ownership and valuable consideration which misled the petitioner, not the fact as to the source of the title to the claims.

(4) When it held that it was an abuse of discretion for the District Court to refuse to retain jurisdiction because of foreign interests at the stage which the case had reached (R. 738e, f), although the motion to dismiss the claim was made immediately it appeared that the claimants' allegations as to the assignments and subrogation were untrue.

II.

Errors contained in the second opinion of the Circuit Court of Appeals which is reported under the style of *The Mandu*, 114 F. (2d) 361, 363.

It is respectfully submitted that in its second decision the Circuit Court of Appeals also erred:

Notwithstanding "glaring faults" of the S. S. "Denderah" (the German ship), which it held were four times as great as those of the S. S. "Mandu" (the Brazilian ship), the Circuit Court of Appeals held that the S. S. "Mandu" was also at fault and that your petitioner, as owner of the "Mandu", is liable for one-fifth of the damages because of "inferential faults" on the part of the "Mandu", although it said that "if the District Judge had seen fit to apply the rule that where fault on the part of one vessel is clear and of itself sufficient to account for the collision, doubts as to the management of the other vessel should be resolved in her favor" we should have hesitated to overrule him (R. 2203). The Court overlooked the fact that the District Court refused to apply the well-settled rule that when one

vessel is guilty of glaring faults, the other vessel should not be held guilty of contributing fault without clear and convincing proof (*The Victory and The Plymothian*, 168 U. S. 410, 423; *The City of New York*, 147 U. S. 72, 85). The District Judge found that the fault of the "Mandu" consisted in proceeding at all after giving her third one blast signal (Conclusions 17 and 18, R. 2184) when the vessels were half a mile apart, although the "Denderah" immediately replied with one blast (Fdg. 53, R. 2179). The Circuit Court of Appeals held that this was four minutes before the collision (R. 2206) and that there was no reason why "the 'Mandu' should have sensed danger when she sounded her third one blast signal" (R. 2207). When the Circuit Court of Appeals reversed the holding of the District Court, there was no holding of the District Court relating to fault of the "Mandu" to be affirmed. Consequently, when the Circuit Court of Appeals resolved the doubt as to fault of the "Mandu" against her, on the theory that it was merely not disturbing a holding of the District Court, it was in error. What the Court did was to resolve a doubt as to the fault of the "Mandu" against her. Its action in so doing was in square conflict with the cases cited.

Reasons for Granting the Writ.

(1) The first of the decisions of the Circuit Court of Appeals is in square conflict with *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, 468, where this Court said:

> "In admiralty, the party entitled to relief should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases."

The language quoted is taken almost verbatim from Benedict on Admiralty, 1st Ed. §380, the standard work on Admiralty practice.

(2) It is also in conflict with decisions in the Fifth and Ninth Circuits. In *The Trader*, 129 Fed. 462, 471 (D. C. W. D. W.) Judge Hanford said:

> "The intervening libellant has no standing in a court of admiralty, for the reason that the evidence proves affirmatively that he has no interest in any of the matters in controversy. He paid nothing to either of the owners of merchandise or baggage alleged to have been lost or damaged, and the several assignments of claims alleged in his libel were intended to give only color of a right to sue for damages. Courts of admiralty do not encourage litigation by mere volunteers. *The Prussia* (D. C.) 100 Fed. 486; *Minturn* v. *Alexandre* (D. C.) 5 Fed. 119; *Fretz* v. *Bull*, 12 How. 468, 13 L. Ed. 1068."

The Circuit Court of Appeals overlooked the foregoing decision and cited in support of its views the decision in the case of *The Rupert City*, 213 Fed. 263 (R. 738d), a decision by Neterer, *J.*, in which the prior decision of the same court in the case of *The Trader* was overlooked. In the subsequent decision in *The Eemdyjk*, 286 Fed. 385, Judge Neterer recognized the authority of *The Trader*, 129 Fed. 462, in a case where the assignee had no beneficial interest.

In the Fifth Circuit in the case of *The Eastfield S. S. Co.* v. *McKeon, et al.* (S. D. Ala.) the District Court cited Benedict on Admiralty, 1st Ed., Sec. 380, and *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, as the law and stated the rule as follows: "As a general rule, the libel should be in the name of the real party in interest." *Eastfield S. S.*

Co. v. *McKeon*, 186 Fed. 357, 358-9. On this principle, it dismissed the libel. The Circuit Court of Appeals for the Fifth Circuit approved the District Court's statement of the law, *Eastfield S. S. Co.* v. *McKeon*, 201 Fed. 465, 470, but reversed the decision "upon the peculiar undisputed facts shown by the evidence".

(3) The decision below is in square conflict with the decision of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, and in *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. In *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, this Court said:

> "The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower Federal courts."

This rule was approved and applied by this Court in that case and again in *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. The decision of the Circuit Court of Appeals is not supported by the cases which it cites, to wit: *The Belgenland*, 114 U. S. 355, and *Thomassen* v. *Whitwell*, 9 Ben. 113, Fed. Cas. #13928. Each of those cases involves collisions which occurred on the high seas, whereas the present case involves a collision which occurred within the territorial waters of Brazil. The present decision, which invites foreigners, who have suffered losses within the territorial jurisdiction of one of them, to seek the jurisdiction of the United States Courts, because there is "no common forum", is, we respectfully submit, not supported by any authority. It is further respectfully submitted, that any such doctrine is dangerous and suggests that the Courts of a foreign country are unfit to deal with cases arising within their territorial jurisdiction. Although there is no question of the right of an American citizen, who is the real party in interest, to have his

cause tried in an American Court, this fact is no basis for granting such right to foreigners, who merely seek the jurisdiction of our Courts because they wish to avoid the Courts of the country where the tort occurred. These German claimants, who by colorable assignments, conveyed bare legal title to their claims to an American assignee, nevertheless retaining their actual ownership of these claims, could not thereby acquire the right to come into our courts under the cloak of such an assignment to an American bill collector. The decision below by condoning false and misleading allegations in the libels and claim made to support jurisdiction in the Courts of the United States, is squarely in conflict with the decision of this Court in *Armour* v. *Ft. Morgan S. S. Co.*, 270 U. S. 253, where this Court said at page 359:

> "Jurisdiction in admiralty cannot be effectively acquired by concealing for a time the facts which establish that it does not exist."

(4) The decision of the Circuit Court of Appeals on the second appeal where it held the steamship "Mandu" guilty of "inferential faults" (R. 2208), although the "gross faults of the 'Denderah'" were four times as great as that of the "Mandu", is in square conflict with a long line of decisions of this Court which hold that where the fault of one vessel is clear and gross, and of itself sufficient to account for the collision, any fault of the other must be established by clear and convincing proof.

The City of New York, 147 U. S. 72, 85;
The Umbria, 166 U. S. 404, 409;
The Victory and The Plymothian, 168 U. S. 410, 423;
The Great Republic, 23 Wall. 20, 25.

It is also in square conflict with decisions to the same effect in the other Circuits.

The Priscilla (C. C. A. 1), 55 F. (2d) 32, 37;
Le Flandre (C. C. A. 3), 9 F. (2d) 331, 332;
The Lizzie M. Walker (C. C. A. 4), 3 F. (2d) 921, 922;
The Wolsum (C. C. A. 5), 14 F. (2d) 371, 376;
Lake Erie Transp. Co. v. *Gilchrist Transp. Co.* (C. C. A. 6), 142 Fed. 89, 95;
Goodrich Transit Co. v. *City of Chicago* (C. C. A. 7), 4 F. (2d) 636, 638;
Northern Nav. Co. v. *Minnesota Atlantic Transp. Co.* (C. C. A. 8), 49 F. (2d) 203, 207;
Pacific Spruce Corp. v. *San Francisco* (C. C. A. 9), 72 F. (2d) 712, 714.

The decision below is also in conflict with the well-settled rule established by the decisions of this Court and in the other Circuits that where a vessel has been placed in extremis by glaring faults of the other, the vessel thus placed in extremis should not be held at fault except upon the clearest evidence.

The Elizabeth Jones, 112 U. S. 514, 526;
The Maggie J. Smith, 123 U. S. 349, 355-6;
The Oregon, 158 U. S. 186, 204;
Rideout v. *Charles Nelson Co.* (C. C. A. 9), 55 F. (2d) 783, 785-6;
The Sea Gull, 23 Wall. 165, 181;
The Nacooche, 137 U. S. 330, 340;
The Carroll, 8 Wall. 302, 306;
The Norne (C. C. A. 5), 59 F. (2d) 145, 148;
The Clara Matthew (D. C. Mass.), 25 F. (2d) 123, 124;
The Shawmut (E. D. Pa.), 261 Fed. 616, 622.

All of the foregoing questions are of the greatest importance. If this Court is to grant a writ of certiorari on the petition of The Great American Insurance Company, it is respectfully submitted that these questions should also be reviewed by this Court.

WHEREFORE, petitioner prays that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing that it send to this Court for review a full transcript of the record in the said Circuit Court of Appeals for the Second Circuit in the case entitled *In the Matter of the Petition of Companhia de Navegacao Lloyd Brasileiro for exemption from or limitation of its liability as owner of the steamship "Mandu", The Great American Insurance Company, et al., Claimants-Appellants, Companhia de Navegacao Lloyd Brasileiro, Petitioner-Appellee,* being No. 197 of the United States Circuit Court of Appeals for the Second Circuit, October Term 1938, reported as *The Mandu,* 102 F. (2d) 545, and further entitled *In the Matter of the Petition of Companhia de Navegacao Lloyd Brasileiro for exemption from or limitation of its liability, as owner of the steamship "Mandu", Companhia de Navegacao Lloyd Brasileiro, Petitioner-Appellant, The Great American Insurance Company, Claimant-Appellee,* being No. 388, October Term, 1940, reported as *The Mandu,* 114 F. (2d) 361, and that the decision of the Circuit Court of Appeals for the Second Circuit, dated March 6, 1939, reported 102 F. (2d) 459, and the order entered thereon March 27, 1939, and the decision of the Circuit Court of Appeals for the Second Circuit dated July 27, 1940 reported 114 F. (2d) 361, and the order entered thereon August 21, 1940, be reversed and that the final decree of the District Court entered herein on the 9th day of February, 1938 (R. 1676) be restored, that the claim of The Great American In-

surance Company be dismissed, and for such further relief in the premises as may be just.

Dated, New York, N. Y., November 19, 1940.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
By FRANK J. MCCONNELL,
Proctor.

JAMES D. BROWN,
T. CATESBY JONES,
LEONARD J. MATTESON,
Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos.

In the Matter

of the

Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, for exemption from or limitation of liability, as owner of the Steamship "MANDU",

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner-Shipowner,

THE GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Respondents-Cargo Claimants.

BRIEF FOR PETITIONER SHIPOWNER.

The Opinions Below.

The Opinions of the District Court.

The opinion of Campbell, *D. J.*, dated August 22, 1930, on exceptions to the first libel is not officially reported but is unofficially reported, 1930 A. M. C. 1672. It is printed in the Record, R. 28.

The opinion of Campbell, *D. J.*, dated September 4, 1935, on motion to suppress interrogatories is officially reported at 11 F. Supp. 845 and unofficially reported, 1935 A. M. C. 1194. It is printed in the Record, R. 153.

The opinion of Moscowitz, *D. J.*, dated June 3, 1936,

on claimants' exceptions to the amended petition is officially reported at 15 F. Supp. 627 and unofficially reported, 1936 A. M. C. 816. It is printed in the Record, R. 210.

The opinion of Inch, *D. J.*, dated July 21, 1937, dismissing the claim of The Great American Insurance Company but allowing time for the filing of additional claims is officially reported at 20 F. Supp. 820 and unofficially reported, 1937 A. M. C. 1062. It is printed in the Record, R. 500.

The opinion of Inch, *D. J.*, dated December 6, 1937, on petitioner's exceptions to new claims directing the dismissal of the claims and allowing the withdrawal of the petition is officially reported at 21 F. Supp. 372 and unofficially reported, 1938 A. M. C. 45. It is printed in the Record, R. 636.

The opinion of Inch, *D. J.*, dated October 16, 1939, on the merits is not officially reported but is unofficially reported, 1939 A. M. C. 1313. It is printed in the Record, R. 2173.

The Opinions of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals on the first appeal dated March 6, 1939, reversing the decree of the District Court dismissing the claims, and sending the case back for decision on the merits is officially reported at 102 F. (2d) 459 and is unofficially reported at 1939 A. M. C. 287. It is printed in the Record, R. 738a.

The opinion of the Circuit Court of Appeals on the second appeal is officially reported at 114 F. (2d) 361 and is unofficially reported in 1940 A. M. C. 1150. It is printed in the Record, R. 2204.

Jurisdiction of This Court.

This is an admiralty proceeding instituted by Companhia de Navegacao Lloyd Brasileiro for exemption from or limitation of its liability as owner of the Brazilian steamship "Mandu" by reason of a collision between that vessel and the German steamship "Denderah" in the Harbor of the Port of Santos, Brazil, in the territorial waters of the Republic of Brazil, on July 31, 1929, as a result of which the "Denderah" sank. The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, 28 U. S. C. A., Sec. 347.

Facts.

The case has been stated in the petition. The following summary of the findings of fact of the District Court and of the Circuit Court of Appeals which are concurrent, may be helpful.

The collision occurred at 7:27 P. M. on July 31, 1929. The "Mandu" was bound out of Santos Harbor and was approaching a final right angle turn in the channel leading to sea when she sighted the "Denderah" well to port beyond the turn in the channel, bound in. The Circuit Court of Appeals found concurrently with the District Court that the vessels were then a mile apart, and that, although the apparent course of the "Denderah" was across the bow of the "Mandu", the situation was in fact one of two vessels meeting rather than crossing. (See this Court's decision in *The Victory and The Plymothian*, 168 U. S. 410.) The "Mandu" twice sounded a one-blast signal to the "Denderah" and each time directed her course slightly to her starboard. Nevertheless, the "Denderah" did not answer either of these

signals (R. 2205). The steamship "West Calumb", which was following the "Mandu" out, turned to her port side of the channel and sounded a two blast signal to the "Denderah". The "Denderah" answered with two blasts. Because of poor lookout and inattention, those on the "Denderah" believed that the two blast signal which they answered had been blown by the "Mandu". The "Mandu" then blew a third one blast signal and again turned slightly to her starboard. The "Denderah" immediately answered with a one blast signal. The "Mandu" and the "Denderah" were then about one-half mile apart. The "Mandu" had reduced her speed and continued somewhat to starboard of her original course. Four minutes elapsed between the exchange of the third one blast signals and the collision. During part of this time, the Courts below found that both vessels were reversing at full speed. Both Courts found that the "Denderah", if properly navigated, could have passed port to port with the "Mandu" and starboard to starboard with the "West Calumb". The collision occurred at the turn in the channel within the "Mandu's" water, *i. e.*, on the "Mandu's" side of the channel (R. 2206).

The "Denderah's" faults were numerous and glaring. Although disputed in the District Court, they were conceded in the Circuit Court of Appeals (R. 2206). She entered a harbor of known danger, without a pilot, in charge of a captain unfamiliar with the waters. She had no lookout and her navigators were inattentive. She violated the Narrow Channel Rule and for some unexplained reason brought herself broadside across the course of the "Mandu", which had continually maintained her course on her own starboard side of the channel and had indicated by whistle signal that she intended to do so. It is significant that the "Denderah's" captain did not testify and that the owners of the "Denderah" never

made any claim against the "Mandu" (R. 2206). The only claims made against the "Mandu" were by the claimant, The Great American Insurance Company, on behalf of foreign interests, chiefly German (R. 2206).

POINT I.

The decision of the Circuit Court of Appeals on the first appeal in this case which held that a bare assignment without consideration and which was not intended to transfer any beneficial interest to the assignee, is sufficient to enable such an assignee to maintain a suit in admiralty is in direct conflict with the decision of this Court in *Fretz* v. *Bull* and with the decisions in the Fifth and Ninth Circuits.

In *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, 468, this Court said:

> "In admiralty, the party entitled to relief should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred only obtains in particular cases."

This decision by this Court in 1851 adopted almost verbatim the statement of this well-recognized principle of Admiralty law as set forth in Benedict on Admiralty, 1st Ed., Sec. 380, which was cited by the Court.

In Benedict on Admiralty, 1st Ed. (1850), Sec. 380, written by Erasmus C. Benedict, it was said:

> "The party really entitled to the relief should always be made libellant. The practice of instituting suit in the name of one person for the benefit of

another, to whom the right has been transferred, and of making one person libellant as the representative of many others, does not obtain in admiralty, though in cases of salvage and some other cases, something analogous to it occurs as will be shown."

This exact language was used in the Second Edition of Benedict (1870) by the same authority and again in the Third Edition edited by Robert D. Benedict (1894), Sec. 380. In the Fourth Edition of Benedict (Edward G. Benedict, 1910) Sec. 309, the language is slightly changed but *Fretz* v. *Bull*, 12 Howard (53 U. S.) 465, is cited as the leading authority. The language was again modified in the Fifth Edition of Benedict on Admiralty (George V. A. McCloskey, 1925), Sec. 244, and again *Fretz* v. *Bull* is referred to as the leading authority. In the Sixth Edition of Benedict on Admiralty just published (Arnold W. Knauth, 1940) the subject is further discussed, Sec. 245. This edition, published since the first decision of the Circuit Court of Appeals below in the instant case, cites that case, *The Mandu*, 102 F. (2d) 459, for the proposition that causes of action for tort are freely assignable except in cases of bodily injury or wrongful death and may be prosecuted in Admiralty in the name of the assignor or assignee. The author, however, because of the present conflict finds it necessary to say that "a merely colorable assignment of a foreign claim to a citizen for the purpose of influencing the Court to take jurisdiction of a wholly foreign cause of action has been disregarded", citing this Court's decision in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, and *Goldman* v. *Furness Withy & Co.* (S. D. N. Y.) 101 Fed. 467.

It appears, therefore, that if the decision below is good law the established rule in Admiralty recognized and

stated by this Court as long ago as *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, may be disregarded, because in the view of the first decision of the Circuit Court of Appeals in this case that rule is no longer law.

The Circuit Court of Appeals bases its disregard of all previous decisions and the rule as stated by the classic work on practice in the Admiralty upon a decision by Judge Neterer, in which he cites common law cases only to sustain his decision. In the subsequent case of *The Eemdyjk*, 286 Fed. 385, Judge Neterer, when he later considered the same question did not even mention *The Rupert City*, but referred to *The Trader*, 129 Fed. 462, as the authority on the subject.

The decision of the Circuit Court of Appeals is in conflict with *The Trader* (W. D. Wash.), 129 Fed. 462, at pages 471, 472. In that case the Court dismissed the claim of an intervening libellant based on an assignment solely for the purpose of bringing suit, saying.

> "The intervening libellant has no standing in a court of admiralty, for the reason that the evidence proves affirmatively that he has no interest in any of the matters in controversy. He paid nothing to either of the owners of merchandise or baggage alleged to have been lost or damaged, and the several assignments of claims alleged in his libel were intended to give only color of a right to sue for damages. Courts of admiralty do not encourage litigation by mere volunteers. *The Prussia* (D. C.), 100 Fed. 486; *Minturn* v. *Alexandre* (D. C.), 5 Fed. 119; *Fretz* v. *Bull*, 12 How. 468, 13 L. Ed. 1068."

To the same effect see:

Wittig v. *Canada Steamship Lines, Ltd.*, 59 F. (2d) 428, 429;
The Lady Drake, 1 F. Supp. 317, 318.

The Circuit Court of Appeals did not mention any of these decisions in its opinion when it said that the practice in admiralty was the same as that in the New York courts. Its reliance was upon *The Rupert City*, 213 Fed. 263 (R. 738b), a case which we have shown is out of line with all the authorities, and was disregarded by the judge who decided it in the later case of *The Eemdyjk*, 286 Fed. 385, 386. This Court cited *The Eemdyjk*, 286 Fed. 385, in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, 423. This Court ignored *The Rupert City*, 213 F. 263. *The Eemdyjk* was also commented upon in *Wittig* v. *Canada Steamship Lines*, 59 F. (2d) 428, 430, where it was said:

> "In *The Eemdyjk* there is nothing to show that its transfer was made simply to obtain jurisdiction."

The decision of the Circuit Court of Appeals is in conflict with the decisions in the Fifth Circuit. In the case of *Eastfield S. S. Co.* v. *McKeon, et al.* (S. D. Ala.), 186 Fed. 357 the District Court applied the law as stated in *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, 468, and in Benedict on Admiralty, 1st. Ed., Sec. 380. The Court said:

> "The party really entitled to the relief should always be made libellant. The practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, and of making one person libellant as the representative of another, does not obtain in admiralty, except in certain cases, as of salvage and other cases somewhat analogous * * *" (p. 357).

Having found that the libellant had no interest in the suit, the Court denied a motion to allow the libellant to amend and to sue in a representative capacity. On appeal, the Circuit Court of Appeals for the Fifth Circuit in *Eastfield S. S. Co.* v. *McKeon* (C. C. A. 5), 201 Fed.

465, approved the statement of the law by the District Court but reversed its decision "upon the peculiar undisputed facts shown by the evidence". The Court said:

> "We do not think it necessary to review and attempt to harmonize the many authorities cited by the learned proctors in their elaborate briefs, nor those recited and relied upon by the District Judge *with whose main proposition that suits in admiralty should be prosecuted in the name of a real party in interest, we agree*, for we decide this case upon the peculiar undisputed facts shown by the evidence" (p. 470). (Italics ours.)

The decision of the Circuit Court of Appeals on the first appeal is in conflict with the long established principles of Admiralty practice, as stated by this Court in *Fretz* v. *Bull, supra*, and applied by the Courts in other Circuits and for that reason should be reviewed by this Court.

POINT II.

The decision of the Circuit Court of Appeals upon the first appeal holding that the refusal by the District Court to entertain jurisdiction in a suit between foreigners arising out of a collision occurring in the territorial waters of a foreign country where jurisdiction was supported only by a colorable assignment of claims, without consideration and without transfer of beneficial ownership, was an abuse of discretion, is in square conflict with the decisions of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413 and other cases.

In *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, 421, this Court said:

> "The rule recognizing an unqualified discretion to

> decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower Federal Courts."

This Court approved and applied this rule and in that case, which was an action for cargo damage which occurred on a Canadian vessel plying the Great Lakes between Canadian ports, resulting from a collision which occurred in American waters, this Court affirmed the dismissal of the libel, saying:

> "It is difficult to conceive of a state of facts more clearly justifying the refusal of a District Court to retain jurisdiction in a cause between foreigners" (p. 424).

In this case, it now appears, without question, that the libellants and claimants are all foreigners; that their claims arise out of damage to cargo almost entirely German owned, laden on a German vessel damaged or lost as the result of a collision which occurred in the territorial waters of Brazil in the Harbor of Santos, more than 5,000 miles from the jurisdiction of the Court where action was brought. Your petitioner is a Brazilian corporation and the steamship "Mandu" was a Brazilian vessel. We submit that it is difficult to conceive of a state of facts more clearly justifying the refusal of the District Court to retain jurisdiction of this cause between foreigners.

The statement of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, 421, quoted *supra*, was but a restatement of the position which it had taken in *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. Among the decisions of the lower Federal Courts referred to in the passage quoted are the following:

> *The Falco*, 20 F. (2d) 362 (C. C. A. 2);
> *The Lady Drake*, 1 F. Supp. 317, at page 318;

Wittig v. *Canada S. S. Lines, Ltd.* (W. D. N. Y.), 59 F. (2d) 428;

The Beaverbrae (E. D. N. Y., Campbell, *D. J.*), 60 F. (2d) 363;

The Paula (*Peters* case) (C. C. A. 2), 91 F. (2d) 1001;

The Tricolor, 1 F. Supp. 934 (S. D. N. Y.), affirmed (C. C. A. 2), 65 F. (2d) 392.

The District Court, observed in this case that:

> "There is no doubt but that the United States citizen was endeavoring to represent foreign underwriters by allegations which were either not proved or shown to be false, but in no instance could this claim of the United States citizen be held a claim filed in a representative capacity. On the contrary, it was one filed in its own alleged right. This claim was held to be invalid and not capable of amendment" (R. 638).

The allegations of the libels and the claim were that The Great American Insurance Company, as assignee of the claims "for a valuable consideration" was "now the owner and holder thereof" (R. 24, R. 39, R. 50, R. 95). These allegations were not sustained because the District Court found "all the claims now sought to be enforced are those of foreign underwriters of cargo on a German ship damaged in a collision with another foreign ship in foreign waters" (R. 638), and that the efforts to prove a real transfer failed for want of proof or for false proof.

It is elementary that jurisdiction cannot be obtained in Admiralty by concealment or by pleading misleading facts.

Armour v. *Fort Morgan Steamship Co.*, 270 U. S. 253, at pages 258, 259;
Lambert Co. v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, at page 382;
The Katahdin, 293 Fed. 824, at page 826;
The Paul L., 4 F. Supp. 537, at page 540.

In *The Paul L.*, 4 F. Supp. 537, at page 540, the Court said:

> "Admiralty jurisdiction was heretofore challenged, but on the face of the libel admiralty jurisdiction was stated. The evidence on trial developed a condition which shows that the libel concealed jurisdictional facts, and the prior ruling on the jurisdictional facts does not confer jurisdiction when none in fact existed."
>
> "Such simple evasions certainly could not succeed", *United States Merchants' & Shippers' Ins. Co.* v. *A/S den Norske Afrika, etc.*, 65 F. (2d) 392, 393.

That the true facts were not alleged in the case in suit has been demonstrated. It also appears in the record that the collision occurred in the territorial waters of Brazil, between a Brazilian ship and a German ship, and that all of the cargo damaged belonged to foreigners, predominantly to Germans. The record also shows that the only American interest pleaded was that of The Great American Insurance Company, as subrogee. It later appeared that this interest was limited to 2½% of a claim of $6,500, which had not been paid in full. The record also established when disclosure was made after trial, that the entire interest of all American underwriters were but fractional parts of claims and amounted after all of them were added together to no more than $599.84 out of a mass of claims totalling $350,000.

The Circuit Court of Appeals disregarded undisputed facts and the situation between the parties when it said that: "the allegations in the libels did not mislead it [the petitioner] in any important particular", and that "the petitioner must have known all along that the title of The Great American to claims against the 'Mandu', whether by subrogation or assignment, came from foreign interests" (R. 738f). The source of the alleged ownership was known from the time that The Great American Insurance Company was forced to amend its first libel (R. 29) and give that information, but after this amendment and persistently thereafter The Great American Insurance Company swore that it was the beneficial owner of the claims and that it had acquired them for a valuable consideration (R. 95, 109).

The Circuit Court of Appeals set up a straw man and knocked him down. We submit that the District Court was clearly right when it exercised its discretion to refuse to retain jurisdiction of the foreign interests "at the stage which the case had reached" (R. 738e). The District Court during the course of trial admonished counsel for The Great American in the following language:

> "If the insurance company wanted to bring the owners of the vessel into court and have their vessel sold and pay their debts, they must take steps to do that, and those steps must be authorized by the facts and by the law. So that you have, in a sense, brought into this court this company, Lloyd Brasileiro, by a libel which, if the facts had been known, would have been open to dismissal" (R. 291).

The motion to dismiss was made at the trial immediately when it appeared from the evidence that the allegation

that The Great American Insurance Company was the owner of the claims was untrue. Your petitioner's motion could not have been made earlier for prior to that time the fact that the allegation of ownership was untrue had not appeared. The fact that the basis for the motion did not appear until a late stage of the litigation when the rights of the real parties in interest might have been prejudiced in other jurisdictions was due solely to the attempt of those interests to support their claim to jurisdiction in the Courts of the United States by allegations then "shown to be false" (R. 638). The situation was thus summed up by the District Court:

> "You are here on limitation proceedings, but the limitation proceedings were precipitated and caused and made necessary by a libel which turns out to have been improperly filed, assuming that there is no proof, and therefore the whole thing starts with an attempt to get jurisdiction in this court by a false statement" (R. 294).

Under such circumstances, the Circuit Court of Appeals should have applied the principle laid down by the Court in *Barney* v. *Baltimore City*, 6 Wall. (73 U. S.) 280, at p. 288: "that the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more".

The Circuit Court of Appeals seemed to be a bit uneasy about its decision because it proceeded to say that "for jurisdictional purposes the case may be treated as one where the adversaries were German shippers on the one side and a Brazilian shipowner on the other" (R. 738e) and that nevertheless because "on such a basis the foreigners interested were of different nationalities; they had no common home to which they might be sent to try the case; no agreement had been made that litigation be

carried on in a particular country. Under these conditions it would have been unusual to have declined jurisdiction even at an early stage" (R. 738e). For a court of this country to accept jurisdiction of a suit between foreigners because it is feared that the courts of neither of the litigants is sufficiently fairminded to try the case as a strong doctrine. To say that neither the Courts of Brazil nor the Courts of Germany are competent to adjudicate a suit in which their respective citizens are involved, may or may not be to state a truth, but certainly it is a sentiment which would be best for a court to keep within its own bosom. The fact, as found by both Courts below, that the German owners of the "Denderah" made no claim against the "Mandu" or her owners in the Courts of either Germany or Brazil (Fdg. 7, R. 2174, R. 2206) indicates that the German cargo interests attempted to invoke the jurisdiction of the Courts of the United States in an effort to secure the application of a rule of law more favorable to the cargo owners than would have been applied in the Courts of the countries where the action should appropriately have been brought.

The principle announced by the decision of the Circuit Court of Appeals if left undisturbed will be a standing invitation to foreigners of whatever nationality to bring their causes, wherever arising, to the Courts of the United States for adjudication on the ground that the parties litigant "have no common home to which they might be sent to try their case". We submit that this is a dangerous precedent and that the decision of the Circuit Court of Appeals should be reviewed and reversed.

There is no judicial support for the view expressed by the Circuit Court of Appeals. The cases cited by that Court—*The Belgenland*, 114 U. S. 355 and *Thomassen* v. *Whitwell*, 9 Ben. 113, Fed. Cas. No. 13928, have no applica-

tion. Each of those cases involve collisions which occurred on the high seas, whereas the present case involves a collision which occurred within the territorial waters of Brazil.

POINT III.

The decision of the Circuit Court of Appeals holding the "Mandu" contributorily at fault and your petitioner liable for one-fifth of the damages because of "inferential faults" on the part of the "Mandu" is in conflict with the decisions of this Court in *The City of New York*, 147 U. S. 72, 85, *The Victory and The Plymothian*, 168 U. S. 410, 423, and other cases, and in conflict with the decisions in all other circuits.

The Circuit Court of Appeals held that the faults of the "Denderah" were "numerous and glaring" (R. 2206) and that they were "gross faults" (R. 2209). In fact, it held that the faults of the "Denderah" "were four times as serious in degree as those of the 'Mandu'" (R. 2208). Such fault, as was found on the part of the "Mandu" was not established by competent proof. The Circuit Court of Appeals held only that—"An injury so extensive indicates a very considerable speed by the 'Mandu' at the time of the impact and justifies an inference either that she was proceeding too fast when danger first became apparent, or (fols. 2210-2230) else that she should have discovered the danger and reversed earlier" (R. 2208). The Court, therefore, found the "Mandu" guilty of "inferential faults". The Court did not say when "danger first became apparent" or when the "Mandu" "should have discovered the danger" but did find that the "Mandu" was reversing at full speed at the time of the collision and during part of

the period of four minutes preceding the collision (R. 2206). There was no evidence that the speed of the "Mandu" was excessive prior to the time when danger first became apparent.

The decision of the Circuit Court of Appeals is squarely in conflict with the decision of this Court in the case of *The City of New York*, 147 U. S. 72, where this Court said at page 85:

> "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

This Court announced the same doctrine in the case of *The Victory and The Plymothian*, 168 U. S. 410, where this Court said at page 423:

> "As between these vessels, the fault of the 'Victory' being obvious and inexcusable, the evidence to establish fault on the part of the 'Plymothian' must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each to establish fault on the part of the other."

This rule has been repeatedly laid down by this Court:

The Great Republic, 23 Wall. 20, 25;
The Oregon, 158 U. S. 186, 197;
The Umbria, 166 U. S. 404, 409.

The same rule has been applied in all other Circuits.

The Priscilla (C. C. A. 1), 55 F. (2d) 32, 37;
Le Flandre (C. C. A. 3), 9 F. (2d) 331, 332;
The Lizzie M. Walker (C. C. A. 4), 3 F. (2d) 921, 922;
The Wolsum (C. C. A. 5), 14 F. (2d) 371, 376;
Lake Erie Transp. Co. v. *Gilchrist Transp. Co.* (C. C. A. 6), 142 Fed. 89, 95;
Goodrich Transit Co. v. *City of Chicago* (C. C. A. 7), 4 F. (2d) 636, 638;
Northern Nav. Co. v. *Minnesota Atlantic Transp. Co.* (C. C. A. 8), 49 F. (2d) 203, 207;
Pacific Spruce Corp. v. *San Francisco* (C. C. A. 9), 72 F. (2d) 712, 714.

Under the principle of these decisions, since the faults of the "Denderah" were "numerous and glaring" and "gross" it was not enough to raise a doubt with respect to the management of the "Mandu". There was some presumption adverse to such claim and any reasonable doubt should have been resolved in favor of the "Mandu". Any fault on her part should have been established by clear and convincing evidence. The inference by the Circuit Court of Appeals of fault on the part of the "Mandu", based solely on the fact that a serious collision occurred, was wholly unjustified. The decision of the Circuit Court of Appeals was, therefore, in conflict with the decisions of this Court and with the Circuit Courts of Appeal in all other Circuits.

The decision of the Circuit Court of Appeals was also in conflict with the decision of this Court in *The Maggie J. Smith*, 123 U. S. 349, where this Court said at pages 355-6:

"The rule is well stated by counsel, that 'if one

> vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages'; or, as stated by the Court of Appeal of England, in the case of the *Bywell Castle*, L. R. 4 Prob. Div. 219, as quoted in the case of *The Elizabeth Jones*, 112 U. S. 514, 526. 'Where one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind.'"

This principle has been repeatedly announced and applied by this Court.

> *The Elizabeth Jones*, 112 U. S. 514, 526;
> *The Sea Gull*, 23 Wall. 165, 181;
> *The Carroll*, 8 Wall. 302, 306;
> *The Nacooche*, 137 U. S. 330, 340;
> *The Oregon*, 158 U. S. 186, 204;

and by Courts of other Circuits.

> *Rideout* v. *Charles Nelson* (C. C. A. 9), 55 F. (2d) 783, 785-6;
> *The Norne* (C. C. A. 5), 59 F. (2d) 145, 148;
> *The Clara Matthen* (D. C. Mass.), 25 F. (2d) 123, 124;
> *The Shawmut* (E. D. Pa.), 261 Fed. 616, 622.

The "Mandu" navigated at all times on her proper course on her right hand side of the channel and the collision occurred on the "Mandu's" side of the channel (R. 2206). The "Denderah", through faults numerous and glaring "violated the Narrow Channel Rule and for some unexplained reason brought herself broadside across the course

of the 'Mandu'" (R. 2206). Such grossly improvident action on the part of the "Denderah" placed the "Mandu" in the position *in extremis*. She should not have been held at fault in that situation, under the principle announced by this Court in the *Maggie J. Smith*, 123 U. S. 349 *supra*, even if she did something wrong or was not maneuvered with perfect skill and presence of mind. In view of the gross faults of the "Denderah" she should have been exonerated.

CONCLUSION.

A writ of certiorari should be granted to review the decisions and orders of the Circuit Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 585

In the Matter

of

The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the Steamship MANDU.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner.

GREAT AMERICAN INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION OF COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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DOUGLAS D. CRYSTAL,
Counsel.

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COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
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GREAT AMERICAN INSURANCE COMPANY,
Respondent.

No. 585.

BRIEF IN OPPOSITION TO PETITION OF COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

In order to avoid any possible confusion between this petition filed by Companhia De Navegacao Lloyd Brasileiro and that filed by the Great American Insurance Company, we shall in this reply brief refer to Companhia De Navegacao Lloyd Brasileiro, owner of the MANDU, as "shipowner", and to the Great American Insurance Company as "cargo claimant".

The reasons which shipowner asserts should motivate this Court to grant shipowner's writ of certiorari are four:

1. Shipowner urges that a "bare assignee" (which Great American Insurance Company is not), is not entitled to claim in a petition for limitation of liability brought by the shipowner.

2. Shipowner urges that although this litigation has proceeded for ten years, including two appeals to the Circuit Court of Appeals for the Second Circuit, all at the instance of petitioner by virtue of its filing petition for limitation of liability, this Court at this date should decide that the courts of the United States had no jurisdiction of the petition which it filed for the reason that cargo claimant "misled" shipowner into filing its petition.

3. Shipowner urges that the decision of the Circuit Court of Appeals for the Second Circuit in retaining jurisdiction in this action *instituted by shipowner* was an abuse of discretion.

4. Shipowner urges that the decision of the Circuit Court of Appeals for the Second Circuit in holding that faults of the MANDU contributed to the collision is in conflict with the decisions of this Court.

Facts.

The facts are not stated in the petition of Great American Insurance Company for writ of certiorari, but inasmuch as the petition of Companhia De Navegacao Lloyd Brasileiro for writ of certiorari in the same case depends in part upon the facts, we are stating the facts here briefly for the convenience of the Court.

The MANDU was outward bound from the harbor of Santos, Brazil, and her course lay westerly through a narrow channel, the northerly side of which was marked

by three black buoys with flashing white lights spaced about 1800 meters apart.

The conditions of visibility were favorable, and lights could be seen at a distance of several miles. There was no wind or tide to impede navigation.

Shortly after the MANDU dropped her pilot she sighted the DENDERAH, inbound, displaying a blue light as a signal for a pilot.

The story of the collision as told by the witnesses for the MANDU and the DENDERAH was strongly conflicting. The MANDU witnesses state that when the vessels were about a mile apart she sounded a one-blast whistle signal and that when no answering signal was sounded by the DENDERAH the MANDU sounded a second one-blast signal, which also was not answered by the DENDERAH. A quarter of a mile astern of the MANDU was another outbound vessel, the WEST CALUMB, which, these witnesses state, sounded a two-blast signal, and the DENDERAH answered with two blasts. The navigators of the MANDU assumed, so their story continues, that the DENDERAH had answered the WEST CALUMB and thereupon sounded a third one-blast signal, which the DENDERAH answered with one blast. The MANDU and the DENDERAH were then about one-half a mile apart, and they estimate that four minutes later the vessels came into collision at right angles at the turn in the channel on the MANDU'S starboard side of the channel, the MANDU'S bow cutting into the starboard side of the DENDERAH just forward of the bridge. Shortly afterward the DENDERAH sank.

According to the witnesses of the DENDERAH, the whistle signals and maneuvers were vastly different. The first signal sounded was a 2-blast signal sounded by the MANDU. At that time the MANDU was in midchannel and proceeding at full speed. Notwithstanding her 2-whistle signal no change of course to port was made. The DEN-

DERAH assented to the 2-whistle signal and changed her course to port. Shortly thereafter the MANDU gave a 1-signal blast indicating that she was directing her course to starboard. The DENDERAH answered this 1-blast signal with a 1-blast signal, thus assenting to the change of maneuver suggested by the MANDU and directed her course to starboard. The MANDU again made no change of course whereupon the DENDERAH's engines were put full speed astern, but the MANDU came at full speed, crashing into the DENDERAH a distance of 18 feet. The DENDERAH, they state, was at all times on her starboard side of the channel, and that is where the collision occurred.

Two independent and unprejudiced witnesses, the Captain and Third Mate, who were on the bridge of the American steamship WEST CALUMB which was following the MANDU out of port, corroborated the story of the DENDERAH, both as to the whistle signals exchanged—the WEST CALUMB officers testified that the 2-blast signals were given by the MANDU and not by the WEST CALUMB and also corroborated the testimony that the collision occurred on the DENDERAH's starboard side of the channel.

At the time of the collision the DENDERAH was practically standing still in the water, but the MANDU was proceeding at high speed, characterized by the District Court as "excessive" speed (R. 2710) and by the Circuit Court of Appeals as "very considerable" speed (R. 2208).

The cargo in No. 2 hold, where the collision occurred, consisted of two locomotives and accessories, steel pipe, barrels of gypsum and steel rails. Notwithstanding this highly resistant type of cargo, the MANDU's bow struck the DENDERAH's steel hull with such force that her stem penetrated the MANDU's side to such a distance that her No. 2 hatch was bent in (R. 2633; 4836). The DENDERAH became a total loss together with a large portion of her cargo.

POINT I.

The decision of the Circuit Court of Appeals that Great American Insurance Company was a proper claimant was the only possible decision under the facts. This decision is not in conflict with any decision of this Court or of any other Court in the United States.

Point I of shipowner's brief refers to the "bare" assignment made to the Great American Insurance Company. Apparently, shipowner would have this Court believe that cargo claimant here was a mere volunteer and had no interest in the litigation. The record shows that Great American Insurance Company was one of the insurers of the shipment of the Siemens Schuckertwerke A. G. (R. 249, 269, 738c) and paid its share of the losses of this company.

We assert here, as we did in the Court below, that no case will be found where a libellant or claimant who had any interest whatever in the claim in suit, has been barred from proceeding with the claim on the ground that it was an assignee.

Shipowner asserts that the decision of this Court in *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, is contrary to the decision of the court below. Paradoxically as it may seem, cargo claimant considers this decision a direct authority for its position.

Shipowner, on page 23 has quoted from *Fretz* v. *Bull*, and *Benedict on Admiralty*, First Edition, page 24. It has referred on page 25 to the later editions of Benedict, but without setting forth the context. The shipowner has indulged in the all too prevalent vice of partial quotation—of extracting a few lines from a statement without reference to the complete statement, or the facts surrounding the statement.

The case of *Fretz* v. *Bull, supra*, is a direct holding that Great American Insurance Company, having an interest

in this litigation, properly presented this claim as assignee of the remaining interests.

In that case, a vessel owned by Bull & Company and cargo owned by others were lost by collision. The Firemen's Insurance Company paid the cargo owners for the loss sustained. Nothing was paid the libellant, Bull & Company. Action was brought in the name of Bull & Company in its own behalf and on behalf of the Firemen's Insurance Company. Objection was made that the libellant could not prosecute this suit for the benefit of others, it being alleged that the libellant had no interest in the action for cargo damage.

This Court found that Bull & Company did have an interest and, having an interest, held that there was no objection to its bringing the action in its name for the Firemen's Insurance Company. The Court said at page 468:

> "Mr. Atwood, in his testimony, says, how Bull & Co. became united with the insurance company in this suit, though it is not stated in the libel with the precise formality it should have been, yet it appears sufficiently plain in other parts of the libel, and from the proofs in the cause, that the parties named in the libel have respectively an interest, which is covered by the principle just stated, that the same state of facts which will give relief to one will permit others to be joined as libellants. It is no substantial objection, then, that the suit has been brought in the name of Bull & Co., for the use of the Firemen's Insurance Company."

Similarly, in *The Thames*, 81 U. S. 98, this Court, speaking through Mr. Justice Strong, said, at pages 108-9:

> "And we think that the libel was rightly filed in the name of Billopp Seaman. By the indorsement of the bills of lading the legal ownership of the cotton

passed to him, as well as the right to control its delivery. *It is a matter of no importance that the beneficial interest may have been in the bank of which he was cashier. The holder of a legal right may always assert it by suit, though he may be accountable to another for what he may recover. A judgment in his favor may always be pleaded in bar against a suit by the beneficial owner. Besides, it is settled that the agent of absent owners may libel in admiralty, either in his own name or in that of his principals.*" (Italics ours.)

To the same effect see:

National Interocean Corp. v. *Emmons Coal Mining Corp.*, 270 Fed. 997;
The Burgondier, 34 F. (2d) 120.

In *Benedict on Admiralty*, 5th Ed., Section 244, p. 322, the following is stated:

"The practice of instituting a suit in the name of a person to whom a right has been transferred does not obtain in admiralty, though when libellant has an interest of his own he may also prosecute the assigned claim of another as thereby a multiplicity of suits is avoided, the objection only going so far as to prohibit the prosecution of a claim by one who is really a stranger to it."

No case has been cited by the shipowner holding that an assignee who had an interest in the subject matter of the litigation may not properly maintain an action as an assignee of the remaining interests.

It is submitted that in a situation such as here, where there are a multitude of interested underwriters, the

assignment to one of the interested underwriters, the Great American Insurance Company, and the filing as claimant in its name, is not only legally correct but, from a practical point of view, is plainly the procedure which should be followed. The Court will note from the report of Commissioner Louis W. Arnold, Jr. (R. 535-575) that there were 88 separate claims. In many of these separate claims there were many individual underwriters. For example, see claim No. 7 (R. 539), claim No. 8 (R. 540), claim No. 17 (R. 545), claim No. 20 (R. 548), claim No. 23 (R. 550). To have filed individual claims for all of the interested parties would have needlessly encumbered the record and wasted the time of the court.

The procedure followed here is that customarily followed in admiralty litigation. In fact, it is quite common where many underwriters are involved to assign all claims to one who may have no interest whatever in the litigation. An excellent example of this customary procedure is found in the case of *May* v. *Hamburg-Amerikanische Packetfahrt, etc.*, 290 U. S. 333. In that case underwriters assigned their claim to Mr. Louis H. May, head of the Loss Department of Chubb & Son, insurance agents in New York City. This court recognized that the libellant was merely an assignee. The first paragraph of this Court's opinion reads:

> "The assignee of cargo owners filed libels against the respondent, the owner of the 'Isis' to recover monies deposited as security for general average contribution the deposit being exacted by the respondent as a condition of delivery" (339).

It should be noted that counsel for the underwriters of the nominal libellant, May, and who undoubtedly gave their advices as to the procedure to be followed, were

Messrs. Bigham, Englar, Jones & Houston, of counsel for the shipowner in this case.

For similar suits by assignees in admiralty in part comparable to the present (although in some of the cases enumerated below it is probable the libellant had no interest whatever but solely legal title) see:

J. V. Lane & Co., Inc. v. *M. S. California*, 1934 A. M. C. 179;
Benjamin M. Merklin, Jr. v. *Johnson & Higgins, et al.*, 1933 A. M. C. 1110;
Dingfelder v. *Navigazione Libera Triestina*, 2 F. Supp. 929;
Chubb v. *Hamburg-American Packet Co.*, 39 Fed. 439;
In re Great Lakes Transit Corp., 81 F. (2d) 441.

POINT II.

Shipowner was not in any way "misled" into filing its petition for limitation of liability.

Shipowner urges that it was "misled" into filing its petition for limitation of liability because of the "false" statement made by Great American Insurance Company in the libels filed prior to the institution of limitation of liability proceedings. There are two answers to this contention. First, it is not true; secondly, shipowner seeks a review of a pure question of fact decided adversely to it in the Court below.

The DENDERAH was a German ship, engaged in trade from continental ports to South America. She did not call in the United States or in any United States possessions. This was well known to the shipowner, a Brazilian corporation. Moreover, in its petition for limitation of lia-

bility filed in the District Court, Eastern District of New York, shipowner did not even credit Great American Insurance Company with *any* ownership of any claim in its own right. The petition alleges as to the first libel:

> "She (the MANDU) was seized on July 7, 1930, by the United States Marshal, at the instance of the Great American Insurance Company, *as assignee* of certain underwriters and owners and subrogated owners and general average and salvage claimants to shipments of cargo on board the steamship DENDERAH" (R. 55).

With respect to the second amended libel, the petition alleges:

> "The amended libel was filed * * * by the Great American Insurance Company, *as assignee* of certain underwriters and owners of shipments of cargo and general average and salvage claimants of cargo on board the DENDERAH" (R. 57).

With respect to the third libel filed by Great American Insurance Company prior to the institution of these limitation proceedings, the petition alleges:

> "Thereafter, a further libel was filed * * * by Great American Insurance Company on the 25th of October, 1930, *as assignee*, of certain underwriters and owners of shipments of cargo and general average and salvage claimants of cargo on board the DENDERAH" (R. 57).

Attached to the petition for liability was Schedule B (R. 65-75), Schedule C (R. 76-81), and Schedule D (R. 82-87) which set forth specifically the names of the for-

eign assignors to the Great American Insurance Company. It thus appears without question from the petition filed by shipowner that it affirmatively sought the jurisdiction of the Federal Court in the limitation of liability proceedings against the claims of one who, according to the allegations of the petition, was an assignee only.

There can be no question but that shipowner was not misled in any respect. It knew that all the interests involved were foreign, and it knew that any rights which Great American had flowed from foreign sources. As the Circuit Court of Appeals said:

> "The petitioner says that it would have pressed the court to decline jurisdiction when the original libels were filed, if it had not been misled by "false and misleading" allegations in the libels concerning the Great American's acquisition of claims. There is little substance in this. The petitioner must have known all along that the title of the Great American to claims against the Mandu, whether by subrogation or assignment, came from foreign interests. It knew that the cargo on board the Denderah was of European origin and bound for South America. It could not have read the lists of shippers and insurance companies given in the libels as the assignors of the libellant without realizing that nearly all of them were German. The allegations in the libels did not mislead it in any important particular" (R. 738 f).

POINT III.

There is no conflict between the decision of Circuit Court of Appeals and the decision of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413.

The District Court in its first decision did not dismiss the limitation proceedings because these parties were foreign, but because it held, erroneously, that there was no claimant before the Court.

At the trial in the District Court the shipowner urged that since this was an action between foreigners arising out of a collision in a foreign port the Court, in its judicial discretion, should allow the petition to be withdrawn. As to this contention the District Court, in its decision of July 21, 1937, said:

> "With this I do not agree, as the petition was properly filed here by the shipowner for limitation or exoneration" (R. 503).

The Court also said:

> "There is, in my opinion, no question of jurisdiction here nor is any raised by the claimant" (R. 504).

In the second decision of Judge Inch the petition was dismissed because the Court found (erroneously) that there was no valid claim before it. The Court said:

> "In such circumstances, where there is present no claim capable of being sued upon, a situation is presented where the court should no longer retain jurisdiction of this action."
>
> "Accordingly, it seems to me that the petitioner has a right to now withdraw and discontinue" * * *

> "Let an order be made dismissing the original invalid claim of the Great American Insurance Company and permitting the petitioner to withdraw its petition and discontinue the action and cancelling its stipulation for value. The court declined further jurisdiction" (R. 641-642).

The foregoing decision was reversed by the Circuit Court of Appeals, saying:

> "The petitioner attempts to support the result below as an exercise of the power of the court to decline jurisdiction in a case where the interests are foreign. It is by no means clear that the Judge dismissed the proceeding on that ground, but would appear from the record to have permitted withdrawal of the petition because of a ruling that there were no claimants before the court" (R. 738 e).

We have no quarrel with any of the cases cited by shipowner under its Point II. However, as appears above, there is no conflict with any decision of this or any other court. This Court pointed out in its decision in *Canada Malting Co.* v. *Patterson,* 285 U. S. 413 at p. 418, that an Appellate Court could and would correct an abuse of discretion of the District Court in its decision as to whether it should exercise jurisdiction.

As pointed out by the Circuit Court of Appeals in its decision at p. 738 e of the Record—had the District Court here declined jurisdiction on the ground that the parties were foreign, at the state the proceedings were in at the time of the decision, this would have plainly been an abuse of discretion. However, as the Court did not make such a decision, the point is moot.

POINT IV.

The decision of the Circuit Court of Appeals in holding the Mandu contributorily at fault is not in conflict with the decisions of this Court or the decision of any other Court. However, in arriving at its decision providing that only one-fifth of cargo-claimant damages be recovered from the Mandu rather than one-half, as allowed by the District Court, the Circuit Court of Appeals made an erroneous appraisal of the gravity of the faults of the respective vessels in so far as these faults contributed to the damages sustained by cargo-claimant.

It is of little moment in appraising the degree of fault that the Court found that the DENDERAH was proceeding on the wrong side of the channel, because she was in plain view of those in charge of the MANDU's navigation. Nor does it add to the gravity of the DENDERAH's fault that the Court found that the DENDERAH failed to keep a good lookout, because twenty lookouts on the DENDERAH would not have enabled those in charge of the MANDU to sooner see the DENDERAH and navigate to avoid her. In brief, the DENDERAH took the one necessary precaution to avoid this disastrous collision—she stopped and reversed her engines. As the Circuit Court of Appeals found:

> "While the DENDERAH was not actually stationary at the moment of collision, her speed was not such as to twist the bow of the MANDU" (R. 2206).

Assuming that the DENDERAH were guilty of other faults alleged against her, such as entering the harbor without a pilot and failure to hear the first two signals of the MANDU, these were antecedent faults that occurred long before the collision or even danger of collision and did

not contribute to the result. Even if it can be said that they contributed to the collision, it is clear that they did not bring about or even contribute to the *sinking* of the DENDERAH, which was caused by the failure of the MANDU to stop and reverse her engines. As the Circuit Court of Appeals found:

> "The vessels came together at right angles, and the stem of the MANDU cut a hole 18 feet deep into the starboard side of the DENDERAH just forward of the bridge" (R. 2206).

That the MANDU failed to take this fundamental precaution but continued on at high speed into collision has been found both by the District Court (R. 2170) and the Circuit Court of Appeals (R. 2208). It is practically conceded by the MANDU's witnesses that she should have stopped and reversed her engines because they attempted by false testimony (which was not accepted by either the District Court or the Circuit Court of Appeals) to prove that the MANDU did stop and reverse. The MANDU witnesses even went so far as to testify that the MANDU was going astern through the water at the time of the collision, a ridiculous contention in the face of the physical fact that her stem plowed 18 feet into the DENDERAH's steel hull. As the Court below said:

> "An injury so extensive indicates a very considerable speed by the MANDU at the time of impact and justifies an inference either that she was proceeding too fast when danger first became apparent, or else that she should have discovered the danger and reversed earlier" (R. 2208).

It was this continuing on at high speed into the jaws of collision that caused the extensive damage, *i. e.*, the sinking of the DENDERAH, resulting in damages amounting to

over $350,000. We submit, therefore, that the MANDU's gross negligence in this respect should be assessed at not less than 50% of the damages sustained by petitioner's cargo, which was the amount assessed by the District Court; certainly not 20%, the amount assessed by the Circuit Court of Appeals, without the benefit of briefs or argument on the gravity of fault.

In brief, apportionment under the Brussels Convention (if this Court decides that the Brussels Convention governs the extent of petitioner's recovery) should not turn on the number of faults of a vessel (some minor, some technical, others not contributing) but apportionment should be based on the effect of the particular faults as they bear upon the damages actually sustained. In the instant case the great extent of damage is directly attributable to the excessive speed of the MANDU, as found by both Courts below. No amount of testimony can dispose of the physical facts, which demonstrate that sinking of the DENDERAH and the extensive damage resulting therefrom was caused by the MANDU's failure to stop and reverse in the presence of danger.

In *Postal Steamship Corp.* vs. *El Isleo,* 308 U. S. 378, this Court, quoting from *The Quoque,* 47 F. (2d) 873 (C. C. A. 2), said:

> "The Court of Appeals aptly said: 'It is a hard rule which requires a master when he sees another vessel about to cross his bow with wanton disregard of his rights to stop and allow the arrogant usurper to pursue his wrongful course. But safety is better than pride; and however slight the hope that rules to promote safety will be observed under such circumstances, whatever courts may say, the vessels must be judged according to their legal duties' " (p. 388).

In *The Manitoba,* 122 U. S. 97, this Court said:

> "The facts in this case are very much like those of *The Stanmore,* 10 P. D. 135, where one of two steam vessels, under like circumstances with those of the *Manitoba,* was held in fault for not stopping and reversing, although the collision was mainly caused by the fault of the other vessel, which was also condemned" (p. 109).

In *The Martello,* 153 U. S. 64, this Court said:

> "The necessity of instantly stopping, or at least of a reduction of speed to the lowest point consistent with the maintenance of steerage way, in the presence of an unknown danger, is one which the masters of steam vessels are slow to appreciate; but the courts have had occasion to enforce it so often it can, as a matter of law, be no longer considered doubtful" (p. 71).

In *Bull Steamship Co.* vs. *United States,* 34 F. (2d) 614 (C. C. A. 2), a collision in New York Harbor, one vessel was held at fault for attempting to pass starboard to starboard and the other for not stopping when her one-blast signal had not been answered. As to the latter vessel the Court said:

> "But her duty began before. Her signal had not been answered, and she could not in the nature of things know what the 'Chinook' proposed to do. Under such circumstances a master is bound to stop his way. *The New York,* 175 U. S. 187, 201, 202, 20 S. Ct. 67, 44 L. Ed. 126; *The Albert Dumois,* 177 U. S. 240, 251, 252, 20 S. Ct. 595, 44 L. Ed. 751; *The Munaires,* 1 F. (2) 13, 15 (C. C. A. 2); *U. S.* v. *Grant,* 11 F.

(2) 700 (C. C. A. 1). There is no more important rule, since vessels, though not quite dead, will so reduce their speed that the collision, if it occurs will be insignificant, as certainly would have been the case here. Had the 'Clare' done her duty shortly after her first signal—that is, as soon as she was in doubt as to the 'Chinook's' navigation—this collision would not have happened" (p. 616).

Inasmuch as this Court has unequivocally held that to apportion the loss otherwise than equally is "utterly impracticable" (*The Atlas, supra*) and the degree of fault was not briefed or argued by either counsel in the Circuit Court of Appeals, we submit that a decision which will hereafter stand as a guide post for all future decisions under the Brussels Convention should not be lightly made on its initial presentation to the Court until thoroughly briefed and argued.

Shipowner asserts that the fault of the MANDU "was not established by competent proof" (Brief, p. 34), and that "there was no evidence that the speed of the MANDU was excessive prior to the time when danger first became apparent" (Brief, p. 35). These statements are directly in conflict with the decision of both Courts below. The District Court characterized the MANDU's speed as "excessive" (R. 2170). The Circuit Court of Appeals characterized her speed as "very considerable" (R. 2208). Indeed, it would seem impossible to come to any other conclusion, in view of the fact that the MANDU's bow plowed 18 feet into the steel hull of the DENDERAH.

This is not a case involving "doubt" with respect to the management of the MANDU as claimed by the shipowner (Brief, p. 36). There could be no doubt as to the fault of a vessel which failed to stop and reverse her engines in the presence of danger, and then in an attempt to avoid the consequences of her own acts produced false

testimony to the effect that the MANDU was actually going astern at the time of the collision, which on the physical facts was an impossibility, as the Courts below found.

Nor can the owners of the MANDU successfully claim that the MANDU was placed *in extremis*. These vessels were proceeding in plain sight of each other. The visibility was good. The position of the DENDERAH was as well known to those on the MANDU as the position was known to those on the DENDERAH, and both vessels should have stopped and reversed in order to avoid collision. This the DENDERAH did, but the MANDU failed to do, as both Courts below found. In these circumstances, it does not lie in the mouth of petitioner (shipowner) to say that the MANDU was put *in extremis*. That well settled doctrine does not apply where each vessel is in plain view and each could have avoided collision by appropriate action. As the Court said in *The Coamo,* 280 Fed. 282 (C. C. A. 2):

> "We see the picture as did Quartermaster Rooney, and find the Essex in fault for having produced, by violation of article 19 of International Rules (Comp. St. §7858), a position of danger, and the Coamo at fault for not sooner realizing that danger, and, when it was realized, for doing exactly the wrong thing. In such a situation as this, arguments concerning orders *in extremis* are not profitable, for there was no excuse in permitting the situation to become *in extremis*" (p. 286).

Furthermore, the Circuit Court of Appeals based its decision upon the so-called "glaring faults" of the DENDERAH, which the Court referred to as "no longer disputed" and "are now admitted" by cargo-claimant (Great Ameican Insurance Company) (R. 2206).

The Court below erred in coming to this conclusion. The so-called "glaring faults" were not "admitted" in any respect. The Great American Insurance Company filed 50 cross-assignments of error to the findings and conclusions of the District Court (R. 2192-8). However, in view of the length of the record and our conviction that the record plainly showed the MANDU to be at least equally at fault with the DENDERAH, the cross-assignments of error were not pressed, and upon the argument in the Circuit Court of Appeals counsel for cargo claimant accepted "for the purpose of this appeal" the findings of the District Court.

CONCLUSION.

The petition of Companhia De Navegacao Brasileiro for certiorari should be denied.

Respectfully submitted,

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New York, December 7, 1940.